Supreme Court, U.S.
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No. 02 734

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

PENN TRIPLE S T/A PENN VENDING COMPANY,
and MELODY VENDING SERVICE,

Petitioners,

v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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93 pp

QUESTIONS PRESENTED

1. Whether the Government is liable for a regulatory taking, under the Fifth Amendment to the Constitution where the Food & Drug Administration (FDA) undertook their implementation of promulgated tobacco regulations in good faith, with the public approval of the President; money was appropriated for their enforcement, but where later the regulations were later held by the Supreme Court to be invalid as beyond the scope of the FDA's statutory authority.

2. Whether a verified request for discovery meets the affidavit requirements of Rule 56 (g) RCFC where the discovery of information in the exclusive possession and control of the government is necessary in order to respond to a dispositive motion filed by the government.

3. Whether a party seeking discovery against the Government under Rule 56 (g) RCFC in opposing a motion for summary judgment by the Government is held to a higher standard for discovery that against a private litigant.

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

Neither of the petitioners is publicly owned nor are any of the parties below publicly owned. There were 101 appellants in the consolidated cases in the Court of Appeals. All are listed in the appeal caption to the consolidated appeals opinion in the appendix. The other parties below were:

BRUBAKER AMUSEMENT CO., INC., PAVLIC VENDING SERVICE, INC., AUTOMATED SERVICES, INC., B & G ENTERPRISES, LTD., A-1 CIGARETTE VENDING, INC., A&B CIGARETTE SERVICE, INC., A&H VENDING CO., INC., A. VAN BRACKEL & SONS, INC., ACE VENDING COMPANY, ADAMS & ADAMS, INC., ADVANCED VENDING CO., ADVANCED CIGARETTE SERVICE, AERO MERCHANDISING CORPORATION, AL FAINI VENDING, INC., ALL STAR AMUSEMENTS, ALLIANCE VENDING, INC., ANDERS VENDING SERVICE, ANDERSON GAMES CO., INC., APPLE VENDING CO., INC., ATLAS VENDING, AUTOMATIC MUSIC & VENDING CORPORATION, AUTOMATIC REFRESHMENT SERVICE, INC., AUTOMATIC VENDING SERVICE CORPORATION, AUTOMATIC MERCHANDISING CO., JAMES A. LEWIS D/B/A B&H VENDORS, BALLARD VENDORS, BECKER ENTERPRISES, BIG STATE VENDING CO., INC., BLUE CHIP VENDING CO., BOB'S MUSIC & CIGARETTE VENDING, INC., C&N SALES CO., INC., CHUCK'S CIGARETTE & VENDING, CIGARETTE VENDING SERVICE OF DALLAS, INC., CLASS A VENDING, COIN-OPERATED VENDING CO., COLONIAL VENDING COMPANY, COMPREHENSIVE VENDING SALES, CT'S VENDING, INC., DEAN SUPERIOR VENDING CO., D.C. VENDING COMPANY, INC., DICARLO VENDING CO., DOLLAR, VENDING COMPANY, EDWARD J. ZARICK, INC. (doing business as ALL-STAR VENDING), ELLIS AMUSEMENT, INC., EMPIRE SMOKES, INC., FRED TOTERA VENDING, INC., GENERAL VENDING SERVICES, INC., HAPPY HOUSE AMUSEMENTS,

HAZELWOOD CORPORATION, HILLMAN VENDING CO., INC., HUGHES MUSIC COMPANY I.T. VENDING & NOVELTY CORPORATION, ISLE VENDING, INC., J&V COIN MACHINE CO., J.S. VENDING, INC., JRE, INC. (doing business as FM VENDING), K&R SERVICES, INC., KAY-CEE VENDING, INC., KENTON NOVELTY CO., INC., LARRY'S AMUSEMENT & VENDING CO., LOWELL VENDING CO., INC., M.J. WHITE, INC., MANNIE'S VENDING, MARK V. HANKS CIGARETTE VENDING, MELO-TONE VENDING, INC., MELODY VENDING SERVICE, MENDOTA VALLEY AMUSEMENT, INC., MIAMI VALLEY AUTOMATED ASSOCIATED, INC., MILLER AMUSEMENT & VENDING CO., MODERN CIGARETTE SERVICE, N.W. SERVICES, INC., NEWMAN AMUSEMENT, INC., NEWPORT MUSIC CO., INC., NORTHERN AMUSEMENT, INC., OHIO VENDING MACHINE, INC., OWEN MUSIC AND GAMES, PARAMOUNT VENDING, INC., PENN TRIPLE S T/A PENN VENDING COMPANY, PIEDMONT BOTTLING & VENDING CO., PIONEER VENDING, INC., PRIDE VENDING, INC., PSI VENDING II, QUALITY ENTERTAINMENT COMPANY, RELIABLE VENDING SERVICE, INC., RENDEZVOUS MUSIC & VENDING, ROY GEORGE MUSIC & VENDING CORPORATION, ROYAL VENDING COMPANY, RUSSEL-HALL AMUSEMENTS & VENDING, SHAFFER SERVICES, INC., STANSFIELD VENDING, INC., STATE MUSIC DISTRIBUTORS, INC., SUBURBAN VENDING, SUPERIOR VENDING CORPORATION, T.D. ROWE CORPORATION, TOTAL SERVICE CORPORATION, VGI VENDING, INC.,
VIDEO DISTRIBUTORS, INC., W.L. PERRY MUSIC CO., INC., WAYNE VENDING CORPORATION, WESTERN AUTOMATIC MUSIC, INC., WILLIAMS ENTERPRISES, INC., KRUEGER VENDING SERVICES, BRIAN SUEMNICHT (doing business as HOME SERVICE VENDING COMPANY), and ANDERSON VENDING & COFFEE SERVICE.

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ON PETITION FOR WRIT OF CERTIORARI
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PETITION FOR A WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered in case No. 01-5120 on August 14, 2002.

OPINION BELOW

The underlying opinion of the Court of Appeals is reported at 2002 U.S. App. LEXIS 14330 and is appended hereto (A-). The Order of the Court of Appeals denying rehearing is appended hereto (A-). The opinion of the Court of Federal Claims is reported at 49 Fed.Cl. 345 (2000), and is appended hereto (A-)

JURISDICTIONAL STATEMENT

This case was brought in the Court of Federal Claims under 28 U.S.C. Sec. 1491. The decision of the Court of Appeals was entered on July 15, 2002. Rehearing was denied on August 14, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitution of the United States, Amendment Five, provides in pertinent part: "...nor shall private property be taken for public use, without just compensation."

21 C.F.R., Sec. 897.16(c), provided:

> Vending machines, self-service displays, mail order sales, and other "impersonal" modes of sale. (1) Except as otherwise provided under this section, a retailer may sell cigarettes and smokeless tobacco only in a direct, face-to-face exchange between the retailer and the consumer.

Examples of methods of sale that are not permitted include vending machines and self-service displays.

(2) Exceptions. The following methods of sale are permitted:

* * * * *

(ii) Vending machines (including vending machines that sell packaged single cigarettes) and self-service displays that are located in facilities where the retailer ensures that no person younger than 18 years of age is present, or permitted to enter, at any time.

Rule 56 (f) of the Federal Rules of Civil Procedure (FRCP) provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Rule 56 (g) of the Rules of the Court of Federal Claims (RCFC) provides:

> Should it appear from the affidavits of a party opposing the motion that such party cannot for reasons stated present by affidavit facts essential to justify such party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

COURSE OF PROCEEDINGS BELOW AND DESCRIPTION

The petitioners, along with ninety-seven (97)other plaintiffs, filed their complaint in the Court of Federal Claims on December 15, 1997,for a taking of their property and for just compensation arising from regulations issued by the U.S Food & Drug Administration. (JA p.8). On February 2, 1998, plaintiffs filed a motion for leave to amend their complaint to add other parties, which the trial court denied (JAp.154). The trial court then issued an order precluding the addition of further plaintiffs and further ordered the cases severed and then consolidating them. (JAp.152). As result of the court's order, several other cases were filed by plaintiffs arising out the same FDA regulations. Those separate cases were consolidated on appeal.

On April 21, 1998, the trial court in this case stayed the proceedings pending final resolution of the challenge to the regulations in Brown & Williamson Tobacco Corp. v. Food & Drug Administration. After this Court's decision in *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), On June 14, 2000, plaintiffs filed a motion for leave to serve interrogatories on the Government which was denied by the trial court. (JA p. 150). On August 3, 2000, the Government filed a motion to dismiss. The plaintiffs responded with a verified motion to conduct discovery. The trial court denied the plaintiffs any discovery (JA p. 146).

The trial court issued its decision on May 10, 2001, granting the Government's motion to dismiss (App. p.). Plaintiffs filed their notice of appeal to the Court of Appeals on May 27, 2001. (JA p. 188).

The Court of Appeals joined the appeals and issued its decision on July 15, 2002, (App. p A-1.). It denied rehearing on August 14, 2002. (App. p.).

STATEMENT OF FACTS

The petitioners in this case own and operated cigarette vending machines. The machines are placed in various business establishments pursuant to contracts, both oral and written, between the petitioners and the owner of the business establishments ('placement contracts"). The contracts vary in length of their terms, some of which may have been in existence for as long as twenty-five years. The average length is ten years. The business establishment is paid a commission or fee for the placement contract. The petitioners buy their cigarettes from the tobacco manufacturers; however, the tobacco companies do not own any part of the machines nor any part of the petitioners. The petitioners are independent from the tobacco manufacturers. The sale, purchase and smoking of tobacco products are legal throughout the United States. Cigarette vending machines have been used in the United States for more than fifty years.

On August 28, 1996, the FDA adopted regulations that so severely restricted the location of cigarette vending machines as to eliminate the placement contracts. 61 C.F.R., sec. 869(c)(2)(ii), 61 Fed. Reg. 44396, 44617. The FDA emphasized its regulations would apply to any location where any person under eighteen would have access at anytime. 61 Fed. Reg. 44450. President Clinton had announced the regulations on August 25, 1996, at a press conference and gave them his wholehearted endorsement. Congress appropriated $34 million annually for enforcement in succeeding years. (JA p.245) The FDA used those funds to pay individual states for enforcement of the regulations. The FDA entered into contracts with the states for the enforcement and reports. Payments for the work were made well into the year after this Court had held the regulations invalid.(JA p.178-179).

In January 1997, the FDA sent letters, signed by Commissioner Kessler, to business establishments that had

placement contracts advising them of the new tobacco regulations and that throughout the year unannounced compliance checks would be conducted. The letter stated that violation of the regulations would result in a $250 or more civil penalty.(JA p. 208). Because of this letter, cigarette vending machines were removed from establishments. To conduct the compliance checks the FDA entered into contracts with state and local governments.(JA p. 229, par 7).

The FDA developed an elaborate training program for teenagers to operate undercover to attempt to buy cigarettes and catch vendors. The FDA claimed that it was not enforcing the act but that is belied by its reports. The FDA conducted 24,099 compliance checks in the year 2000 alone pursuant to the contracts with the states. In September 1997, the FDA sent out another warning letter to business establishments with cigarette vending machines. The money appropriated by Congress for tobacco regulation was used to pay the states and local governments for their enforcement activity.

This Court on March 21, 2000, held the FDA regulations invalid. *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120 (2000)

REASONS FOR GRANTING THE WRIT

I

The FDA, with the approval of the President adopted tobacco regulations that destroyed the Petitioner's placement contracts with business establishments. Congress concurred in the action taken by the FDA by appropriating money for enforcement of the regulations. The Fifth Amendment to the Constitution requires the payment of just compensation for the taking of a citizen's property. The Amendment does not distinguish between real and personal property, be it tangible or intangible. The Court of Appeals therefore erroneously

upheld the decision of the Court of Federal Claims denial of compensation.

This case raises an important question of Constitutional law regarding the Takings clause in the Fifth Amendment. Where the Government, with approval of the President, adopts regulations, which Congress appropriates money to enforce, which this Court ultimately holds invalid, subjects the Government to liability for a compensable taking in the period between the adoption of the regulations and this Court's decision. The Court of Appeals side-stepped this issue but the Court of Federal Claims held there was no liability relying upon this Court's decision in *Hooe v. United States*, 218 U.S. 322 (1910). The decision in *Hooe*, however, has been misconstrued and resulted a maxim that is alien to the Fifth Amendment, namely, that the Government is not liable for a taking if it acted without authority.

Hooe involved a real estate lease where the lessor to the Government sought to increase the rent after Congress specifically refused to appropriate the additional money for the rent. This Court held that the lessor could not claim compensation for a taking after Congress expressly declined an appropriation for the rent. In the case at bar, Congress appropriated money for the FDA's enforcement of the tobacco regulations. While Petitioners in this case are not asking this Court to overrule *Hooe* they are asking the Court to clarify and create an exception to *Hooe* that fulfills the intent of the Takings Clause in the Fifth Amendment. *Hooe* represents a departure in the interpretation of the Takings Clause. The maxim that the Government is not liable for a taking if there was no authority is a departure from 19th Century views. This Court in *United States v. Lee*, 106 U.S. 196, 220 (1882), took the view that approval by the President could not prevent liability.

The Federal Circuit has previously carved out an exception to the "no authority" maxim in *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3rd 1358 (Fed. Cir. 1998) where it held that agency good faith was enough to hold the Government liable. The trial court declined to apply the exception in this case even though it is obvious that the FDA acted in good faith in promulgating the regulations. The Department of Justice argued in the District Court, Court of Appeals and this Court in *Brown & Williamson* that the FDA tobacco regulations were valid and authorized the Congressional action although it never mentioned in its brief to this Court in *Brown & Williamson* that Congress had appropriated money for their enforcement. Now it argues that because the FDA lacked authority there is no liability.

At some level there must be a presumption of authority for the action taken by the Government to impose liability on the Government for a taking. Certainly, it should attach at the Presidential and cabinet levels. It should also attach at some departmental level. It should be a rebutable presumption if the cabinet level officer or department head acted so irresponsibly that citizens could readily discern that there was no authority for the action that was taken. If the Department of Justice adopts a position in other litigation that the Government had authority where the regulations were challenged then fairness compels that the Government be bound for takings law purposes. If Congress appropriates money for the implementation of the acts of the executive branch, there should be a presumption of authority.

Judge Damich, in a companion case in the Court of Federal Claims, in *Board Machine, Inc. v. United States*, 2001 U.S. Claims LEXIS 78 (pending in the Federal Circuit), in essence urged the adoption of such a presumption saying at p. 16:

> Again, it should be emphasized that this is a case where Plaintiffs allegedly suffered some economic harm directly attributable to the FDA's regulations. Nevertheless, the lack of FDA authority was unmistakable. This court simply believes that a presumption in favor of "authorization" is warranted, in cases of Congressional ambiguity, silence or acquiescence, where its scope, taking into account a reasonable person's view.

The Fifth Amendment provides for the payment of just compensation for the taking of private property by the Government. A plain reading of the takings clause applies to all forms of property, real or personal, tangible or intangible. The Government took this property for the alleged purpose of preventing teenagers from smoking cigarettes. Whether the Government was right or wrong in adopting the regulations is not at issue here. The only issue is whether the Government is obligated to pay just compensation for the property that was eliminated by the regulations.

The burden for the cost of preventing teen smoking has been placed solely upon the cigarette vending industry. The cost was not placed upon the growers of tobacco; the manufacturers of cigarettes, who can still make and sell cigarettes; or retailers, such as convenience stores, who can still sell cigarettes. The smallest part of the sale of cigarettes, vending machines, less than 1%, has borne the cost. The Fifth Amendment reaches this very type of taking. In *Eastern Enterprises v. Apfel,* 524 U.S. 498 (1998), this Court held a taking occurred in administering the Coal Act. This Court pointed out that in considering the regulation's economic impact on the claimant, courts must look to the justice and fairness of requiring that economic injuries caused by public action be compensated by the government rather than remain

disproportionately concentrated on a few persons. The taking of individual property rights for the collective, compels the payment of just compensation to the property owner as pointed out by Mr. Justice Holmes in *Pennsylvania Coal v. Mahon,* 260 U.S. 393, 415 (1922).

In *Penn Central Transportation Co. v. City of New York,* 483 U.S. 104 (1978), this Court identified three factors to be considered in determining whether a government regulation had gone too far and constituted a taking. They are: (1) the regulation's economic impact on the claimant; (2) the regulation's interference with distinct investment backed expectations; and (3) the character of the governmental action.

In *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), this Court held that deprivation of all economically beneficial use of property would constitute a taking regardless of the importance of the governmental interest being served.

Contracts constitute a property interest that is subject to the takings clause of the Fifth Amendment. *Ruchelshaus v. Monsanto Co.* 467 U.S. 986, 1003 (1984), citing *Lynch v. United States,* 292 U.S. 571, 579 (1934) See also *Philips v. Washington Legal Foundation,* 524 U.S. 156 (1998). The Petitioner's Amended Complaint alleges a taking of property by the Government from August 11, 1995, the date of the *Notice of Proposed Rule Making,* announcing the regulations, to March 21, 2000, the date the regulations were held invalid by this Court.

II

Both courts below permitted the Government to withhold documents requested by the Petitioners that would have shown that the FDA had enforced the tobacco regulations during the period January 1997 to March 21, 2000. The Petitioner alleged in their Amended Complaint that the Government had enforced the regulations during that period.

After the Government filed its motion to dismiss or for summary judgment on August 3, 2000, petitioners filed a request to conduct discovery under RCFC 56 (g) and argued for discovery at the hearing before the trial judge on October 31, 2000. (JA p. 158). The Government filed a Declaration of Anne Kirchner of the FDA.(JA. p. 226) Petitioners filed several declarations contradicting the Kirchner declaration.(JA. p.248-298) The petitioners argued that they could not fully respond to the Government's motion without the discovery. That was denied by the trial judge.(JA p. 146). The petitioners sought the following information from the Government: (1) To whom were the Kessler letters sent and when; (2) is there correspondence between the recipients of the letters and the FDA; (3) did the FDA instruct persons engaged in sting operations and inform them which establishments had vending machines; (4) were any establishments with vending machines fined and when; (5) what did the contracts between the FDA and the states or local governments provide regarding enforcement; (6) how much were the states or local governments paid, when, and for what; and (7) what did the reports from the states to the FDA say.

It was known at the hearing before the trial judge that the FDA had entered into the contracts with the states and local governments because the Government had filed a Declaration by Anne Kirchner of the FDA that had so stated. She also stated in the Declaration that the FDA had not enforced the regulations.(JA p. 229). That was contradicted by

declarations that were filed by the cigarette vendors that there was enforcement by FDA using the states and local governments (JA p. 250-298).

Rule 56 (g) RCFC is identical to Rule 56 (f) FRCP. The Court of Appeals upheld the denial of discovery on the grounds that petitioners had not filed affidavits and that they had not produced evidence to contradict the claim of the FDA that it had not enforced the regulations. The essence of the lower court rulings is that they found, as a matter of fact that the regulations were not enforced in spite of the contrary affidavits or declarations of the cigarette vendors. Three glaring errors emerge from this ruling.

First, the Court of Appeals stated that "appellants did not file affidavits" when it is clear in the record that they did (JA p.250). Declarations under oath are the same as affidavits. Second, the trial court and the court of appeals weighed the conflicting declarations and made findings of fact that there was no enforcement This is contrary to this Court's holdings in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986) and *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986) that preclude the trial court weighing conflicting evidence under Rule 56. Third, the Court of Appeals set a higher standard for a party responding to a motion for summary judgment under Rule 56 (g) by the Government than for private parties under Rule 56 (f) of the Federal Rules of Civil Procedure. Under the interpretation adopted by the Court of Appeals for the Federal Circuit, a party seeking discovery to respond to a motion for summary judgment must prove his case before being entitled to discovery. This is in conflict with the other circuits who have taken a much more liberal approach to Rule 56. See *Krieger v. Fadely,* 211 F.3rd 134 (D.C. Cir. 2000) and *GAB Business Services v. Ayndicate,* 809 F.2d. 755 (11th Cir. 1987).

RCFC 12 (b) specifically provides that the non-moving party be given a reasonable opportunity to present all pertinent

materials where the moving party has presented materials outside of the pleadings. The court should then treat it as one for summary judgment under RCFC 56. *Thoen v. United States,* 765 F.2d 1110, 1113 (Fed.Cir. 1985). Under Rule 56 (g) the petitioners were entitled to discovery to respond to the Government's motion because the information needed to respond is largely in the hands of the Government. In such circumstances, other circuits have held that the non-moving party should be entitled to discovery. *Resolution Trust Corp. v. North Bridge Assn.,*22 F.3rd 1198 (1st Cir. 1994) and *Gay v. Wall,* 761 F.2d 175 (4th Cir. 1985).

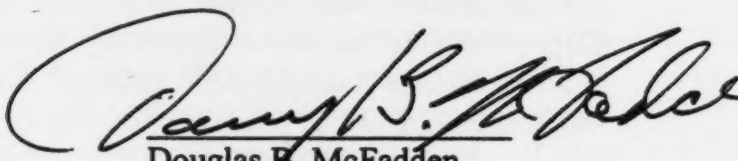
The decision of the Court of Appeals in this case is therefore in conflict with the decisions of the courts of appeal for the First, Fourth, Eleventh and District of Columbia circuits.

There is no legal or logical reason for the Government to be permitted to hide or conceal relevant documents in this case. National security issues are not involved. No claim of privilege has been asserted nor have they asserted that it would be burdensome. It could hardly be deemed a "fishing expedition" because the documents were identified with reasonable specificity. The Petitioners were denied a fair opportunity to present all evidence to support their contention by the denial of production of the documents.

CONCLUSION

WHEREFORE, Petitioners, for the foregoing reasons, pray this Court issue a writ of certiorari to review the decision of the Court of Appeals for the Federal Circuit.

Respectfully submitted,



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APPENDIX

United States Court of Appeals for the Federal Circuit

01-5070,-5080,-5083,-5084,-5120

BRUBAKER AMUSEMENT CO., INC., PAVLIC VENDING SERVICE, INC., AUTOMATED SERVICES, INC., B & G ENTERPRISES, LTD., A-1 CIGARETTE VENDING, INC., A&B CIGARETTE SERVICE, INC., A&H VENDING CO., INC., A. VAN BRACKEL & SONS, INC., ACE VENDING COMPANY, ADAMS & ADAMS, INC., ADVANCED VENDING CO., ADVANCED CIGARETTE SERVICE, AERO MERCHANDISING CORPORATION, AL FAINI VENDING, INC., ALL STAR AMUSEMENTS, ALLIANCE VENDING, INC., ANDERS VENDING SERVICE, ANDERSON GAMES CO., INC., APPLE VENDING CO., INC., ATLAS VENDING, AUTOMATIC MUSIC & VENDING CORPORATION, AUTOMATIC REFRESHMENT SERVICE, INC., AUTOMATIC VENDING SERVICE CORPORATION, AUTOMATIC MERCHANDISING CO., JAMES A. LEWIS D/B/A B&H VENDORS, BALLARD VENDORS, BECKER ENTERPRISES, BIG STATE VENDING CO., INC., BLUE CHIP VENDING CO., BOB'S MUSIC & CIGARETTE VENDING, INC., C&N SALES CO., INC., CHUCK'S CIGARETTE & VENDING, CIGARETTE VENDING SERVICE OF DALLAS, INC., CLASS A VENDING, COIN-OPERATED VENDING CO., COLONIAL VENDING COMPANY, COMPREHENSIVE VENDING SALES, CT'S VENDING, INC., DEAN SUPERIOR VENDING CO., D.C. VENDING COMPANY, INC., DICARLO VENDING CO., DOLLAR, VENDING COMPANY, EDWARD J. ZARICK, INC. (doing business as ALL-STAR VENDING), ELLIS AMUSEMENT, INC., EMPIRE SMOKES, INC., FRED TOTERA VENDING, INC., GENERAL VENDING SERVICES, INC., HAPPY HOUSE

AMUSEMENTS, HAZELWOOD CORPORATION, HILLMAN VENDING CO., INC., HUGHES MUSIC COMPANY I.T. VENDING & NOVELTY CORPORATION, ISLE VENDING, INC., J&V COIN MACHINE CO., J.S. VENDING, INC., JRE, INC. (doing business as FM VENDING), K&R SERVICES, INC., KAY-CEE VENDING, INC., KENTON NOVELTY CO., INC., LARRY'S AMUSEMENT & VENDING CO., LOWELL VENDING CO., INC., M.J. WHITE, INC., MANNIE'S VENDING, MARK V. HANKS CIGARETTE VENDING, MELO-TONE VENDING, INC., MELODY VENDING SERVICE, MENDOTA VALLEY AMUSEMENT, INC., MIAMI VALLEY AUTOMATED ASSOCIATED, INC., MILLER AMUSEMENT & VENDING CO., MODERN CIGARETTE SERVICE, N.W. SERVICES, INC., NEWMAN AMUSEMENT, INC., NEWPORT MUSIC CO., INC., NORTHERN AMUSEMENT, INC., OHIO VENDING MACHINE, INC., OWEN MUSIC AND GAMES, PARAMOUNT VENDING, INC., PENN TRIPLE S T/A PENN VENDING COMPANY, PIEDMONT BOTTLING & VENDING CO., PIONEER VENDING, INC., PRIDE VENDING, INC., PSI VENDING II, QUALITY ENTERTAINMENT COMPANY, RELIABLE VENDING SERVICE, INC., RENDEZVOUS MUSIC & VENDING, ROY GEORGE MUSIC & VENDING CORPORATION, ROYAL VENDING COMPANY, RUSSEL-HALL AMUSEMENTS & VENDING, SHAFFER SERVICES, INC., STANSFIELD VENDING, INC., STATE MUSIC DISTRIBUTORS, INC., SUBURBAN VENDING, SUPERIOR VENDING CORPORATION, T.D. ROWE CORPORATION, TOTAL SERVICE CORPORATION, VGI VENDING, INC., VIDEO DISTRIBUTORS, INC., W.L. PERRY MUSIC CO., INC., WAYNE VENDING CORPORATION, WESTERN AUTOMATIC MUSIC, INC., WILLIAMS ENTERPRISES, INC., KRUEGER VENDING SERVICES, BRIAN SUEMNICHT (doing business as HOME SERVICE VENDING COMPANY), and ANDERSON VENDING &

COFFEE SERVICE,

Plaintiffs-Appellants,

v

UNITED STATES,

Defendant-Appellee.

Douglas B. McFadden, McFadden & Shoreman, P.C., of Washington, DC, argued for plaintiffs-appellants. With him on the brief was John M. Shoreman.

Mark A. Melnick, Assistant Director, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief were Stuart E. Schiffer, Acting Assistant Attorney General; and David M. Cohen, Director. Of counsel on the brief were Katherine M. Kelly, Trial Attorney, Department of Justice;
Michael M. Landa, Acting Chief Counsel; and Karen E. Schifter, Associate Chief Counsel, Food and Drug Administration, Rockville, Maryland.

John D. Echeverria, Environmental Policy Project, Georgetown University Law Center, of Washington, DC, for amici curiae The American Cancer Society, et al.

Appealed from: United States Court of Federal Claims

Judge Diane Gilbert Sypolt

BRUBAKER AMUSEMENT CO., INC., PAVLIC VENDING SERVICE, INC., AUTOMATED SERVICES, INC., B & G ENTERPRISES, LTD., A-1 CIGARETTE VENDING, INC., A&B CIGARETTE SERVICE, INC., A&H VENDING CO., INC., A. VAN BRACKEL & SONS, INC., ACE VENDING COMPANY, ADAMS & ADAMS, INC., ADVANCED VENDING CO., ADVANCED CIGARETTE SERVICE, AERO MERCHANDISING CORPORATION, AL FAINI VENDING, INC., ALL STAR AMUSEMENTS, ALLIANCE VENDING, INC., ANDERS VENDING SERVICE, ANDERSON GAMES CO., INC., APPLE VENDING CO., INC., ATLAS VENDING, AUTOMATIC MUSIC & VENDING CORPORATION, AUTOMATIC REFRESHMENT SERVICE, INC., AUTOMATIC VENDING SERVICE CORPORATION, AUTOMATIC MERCHANDISING CO., JAMES A. LEWIS D/B/A
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COFFEE SERVICE,

Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

DECIDED: July 15, 2002

Before MICHEL, BRYSON, and GAJARSA, Circuit Judges.

Opinion for the court filed by Circuit Judge GAJARSA. Opinion filed by Circuit Judge MICHEL, concurring.

This is a consolidated appeal of three cases, A-1 Cigarette Vending Inc., v. United States, No. 01-5120, B & G Enterprises, Ltd., v. United States, No. 01-5080, and Brubaker Amusement Co. v. United States, Nos. 01-5070, -5083, and -5084. The appellants, owners and operators of tobacco vending machine businesses, appeal the dismissal of their complaints by the United States Court of Federal Claims. They seek just compensation for the alleged temporary regulatory taking of their property, their vending machine placement contracts, by the Food and Drug Administration ("FDA") tobacco regulations. They allege that their property was taken in violation of the Fifth Amendment of the United States Constitution. Because we agree with the trial court that the challenged tobacco regulations were never in effect and enforced, we affirm. In so doing, we note that the Supreme Court's recent pronouncement on the availability of temporary takings claims does not affect our conclusion, as the absence of government enforcement alone sufficiently resolves this appeal.

See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465 (2002).

BACKGROUND

In 1995, the FDA asserted jurisdiction to regulate tobacco products under its authorizing statute, the Food, Drug and Cosmetic Act, 21 U.S.C. § 301 et seq. The FDA proposed regulations concerning tobacco products on August 11, 1995, and they were published in final form on August 28, 1996, after notice and comment. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396 (Aug. 28, 1996) (codified at 21 C.F.R. pts. 801, 803, 804, 807, 820, and 897 (1997)). Among other things, the issued regulations banned the sale of cigarettes and smokeless tobacco from vending machines in venues accessible to people under the age of 18. The term "the vending machine regulations" will be hereinafter used to identify the segment of the regulations that restricted the sale of tobacco products from vending machines to locations where no one under the age of 18 was present or allowed to enter at any time, namely those codified at 21 C.F.R. § 897.16(c). The tobacco regulations were to become effective at different times, with the vending machine regulations set to become effective on August 28, 1997. All of the regulations were challenged in the United States District Court for the Middle District of North Carolina as exceeding the legal and regulatory authority of the FDA. Coyne Beahm, Inc. v. FDA, 966 F. Supp. 1374 (M.D.N.C. 1997). On April 25, 1997, the district court ordered, among other things, that the FDA stay implementation of those regulations set to take effect on August 28, 1997, which included the vending machine regulations, pending further orders by the court. Id. at 1400-01. On March 21, 2000, the Supreme Court decided FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000),

holding generally that the FDA had no authority to regulate tobacco products and, more specifically, that the FDA was statutorily prohibited from doing so. The regulations were therefore invalid.

On December 15, 1997, the appellants in this case filed a complaint with the Court of Federal Claims ("the trial court") claiming that the tobacco vending machine regulations had effected a categorical taking of their property without just compensation because the contracts for the placement of their cigarette vending machines were terminated as a result of the regulations. The trial court stayed the action pending the outcome of Brown & Williamson. Subsequent to the Supreme Court's decision, the appellants amended their complaint to allege a temporary taking and a taking based on the states' implementation of the vending machine regulations as agents of the federal government in order to obtain grants from the Department of Health and Human Services. The latter argument, premised on the agency theory, was rejected in an interlocutory appeal brought in one of the presently consolidated cases, B & G Enterprises, Ltd. v. United States, 220 F.3d 1318 (Fed. Cir. 2000), cert. denied, 531 U.S. 1144 (2001) ("B & G Enterprises I"), because this court found that there was no manifestation of an intent to create an agency relationship by either the federal government or the State of California. Id. at 1323. The claim based on the agency argument was eventually dismissed voluntarily by the plaintiffs in the remaining two cases, leaving only the temporary takings claims.

With only the temporary takings claim remaining, the plaintiffs moved to conduct discovery to ascertain whether or not the government had specifically enforced the regulations. The trial court denied plaintiffs' motions to conduct discovery and granted the government's motion to dismiss, which was premised on the Supreme Court's decision in Brown

& Williamson. The Supreme Court specifically held that the FDA does not have regulatory authority over tobacco products. Brown & Williamson, 529 U.S. at 133. The government argued that this lack of authority to regulate tobacco products precludes recovery because a takings claim cannot stand when there was no authority for the act. The government also argued that the FDA never enforced the vending machine regulations, and therefore there was no temporary taking. Finally, the government argued, there was no temporary taking as a matter of substantive law.

Three cases were joined in this consolidated appeal: A-1 Cigarette Vending, Inc. v. United States, No. 01-5120, B & G Enterprises, Ltd., v. United States, No. 01-5080 ("B & G Enterprises II"), and Brubaker Amusement Co. v. United States, Nos. 01-5070, -5083, and –5084 ("Brubaker Amusement"). In A-1 Cigarette, the trial court addressed all three of the arguments presented by the government, namely the lack of authority, the lack of enforcement, and the absence of a taking as a matter of substantive law. 49 Fed. Cl. 345 (2001). It concluded that the FDA did not have statutory authorization to regulate tobacco products, and that therefore there could be no compensable taking because in order to establish a regulatory taking by the government, the agency implementing the regulation must have had statutory authority to issue the regulation. Id. at 351, 355. The trial court dismissed the complaint on the lack of authority to issue the regulations. Id. at 355. The trial court also addressed the government's second argument and determined that there could be no takings claim because the vending machine regulations were never enforced. Id. at 360. The trial court treated the motion to dismiss as a motion for summary judgment, pursuant to Rule of the Court of

Federal Claims ("RCFC") 12(c),[1] id. at 357, and granted summary judgment to the government based upon the absence of enforcement, id. at 360. The trial court, however, declined to decide the issue as to whether or not there could be a taking as a matter of law, but noted that there probably could not be a taking in this case. Id. at 361. In B&G Enterprises II, the trial court, also treating the government's motion to dismiss as one for summary judgment, dismissed the complaint because the regulations were never enforced. 48 Fed. Cl. 866, 866 n.2, 869 (2001). It did not address the other two arguments. In Brubaker Amusement, the trial court dismissed the complaint because, as there was no statutory authority for the regulations, the FDA's actions could not create a compensable takings claim. No. 98-511C, slip op. at 6 (Ct. Fed. Cl. Jan. 12, 2001). It declined to rule on the government's alternative argument of non-enforcement. Id. at 7. For purposes of this appeal, unless otherwise stated, reference to the trial court's opinion is to the opinion in the A-1 Cigarette case, which discussed all of the submitted theories for negating the alleged regulatory taking.

We have jurisdiction over the appeal pursuant to 28 U.S.C. § 1295(a)(3). We agree with the trial court that the regulations were never enforced by the FDA

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[1] RCFC 12(c), which is identical to Federal Rule of Civil Procedure 12(c), states:

> After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

and therefore no temporary taking could result as a matter of law. Because we resolve the matter before us on that issue, we decline to address the other remaining issues.

STANDARD OF REVIEW

This court reviews a dismissal for failure to state a claim without deference. Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States, 48 F.3d 1166, 1170 (Fed. Cir. 1995). A plaintiff fails to state a claim upon which relief may be granted if the plaintiff cannot assert a set of facts that would support its claim. Id. at 1169. In reviewing the Court of Federal Claims' grant of such a motion, this court assumes that all well-pled factual allegations are true and resolves all reasonable inferences in favor of the nonmovant. Id. at 1169-70.

Pursuant to RCFC 12(c), the trial court may convert a motion to dismiss into a motion for summary judgment under RCFC 56 if it relies on evidence outside the pleadings. RCFC 12(c). This court reviews the trial court's grant of summary judgment de novo, construing the facts in the light most favorable to the non-moving party. Cienega Gardens v. United States, 265 F.3d 1237, 1244 (Fed. Cir. 2001). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56; see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The standard of review on discovery matters is whether an abuse of discretion occurred. Keebler Co. v. Murray Bakery Prods., 866 F.2d 1386, 1388 n.1, 9 USPQ2d 1736, 1738 n.1 (Fed. Cir. 1989).

DISCUSSION

Appellants assert that the tobacco regulations took their property, the vending machine contracts, in violation of the Fifth Amendment of the United States Constitution. In particular, appellants argue that the property was taken temporarily between August 11, 1995, the date of the proposed regulations, and March 21, 2000, the date of the Brown & Williamson decision of the Supreme Court. Appellants raise two arguments with respect to enforcement of the vending machine regulations. First they assert that there is evidence showing enforcement of the regulations sufficient to raise a triable issue of fact. Second they assert that even if they have not presented sufficient evidence to support a triable issue of fact, that failure is due to the trial court's refusal to allow discovery on this point.

I. Evidence of Enforcement

The Fifth Amendment provides in relevant part: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V, cl. 4. The Supreme Court has stated that "[c]ontract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid." United States Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 19 n.16 (1977). However, governmental interference with contractual rights does not necessarily constitute a taking of property. B & G Enterprises I, 220 F.3d at 1323; Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224 (1986). Therefore, as this court stated in B & G Enterprises I, for purposes of this appeal, we accept but do not decide that the vending machine contracts may constitute "property," but we conclude that even if they are property rights, a taking did not occur. 220 F.3d at 1323.

The Supreme Court has repeatedly emphasized a distinction between takings claims that arise in the context of facial challenges and those that arise in the context of challenges to the application of a statute or regulation to a particular piece of property. As the Court stated in Keystone Bituminous Coal Ass'n v. DeBenedictis, "we have recognized an important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation." 480 U.S. 470, 494 (1987). The former constitutes a takings claim based on a facial challenge, while the latter constitutes a takings claims based on an "as-applied" challenge. Cf. id. at 494-95. Two important consequences derive from this distinction: first, plaintiffs pursuing a facial challenge must show that the provision is unconstitutional in all its applications, and second, plaintiffs pursuing an as-applied challenge must show that the provision was applied to them in such a way that deprived them of their property.

A review of takings jurisprudence leads to the conclusion that where an as-applied challenge is not ripe, a facial challenge may still be present. In the context of facial challenges, the "mere enactment" of legislation may be sufficient to constitute a taking claim. See Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 736 n.10 (1997) ("Such 'facial' challenges to regulation are generally ripe the moment the challenged regulation or ordinance is passed, but face an 'uphill battle' . . . ."); Keystone, 480 U.S. at 495; Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295 (1981); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

Unlike the context of a facial challenge, where mere enactment is sufficient to make a claim ripe, the Supreme Court has not held that it is sufficient in the

context of an as-applied challenge. See Danforth v. United States, 308 U.S. 271, 284, 286 (1939) (holding, in the context of a physical taking, that the mere enactment of legislation which authorizes the condemnation of property cannot be a taking because it can be repealed or modified or the appropriations might fail). This stems naturally from the requirement of "application" to a particular piece of property in as-applied challenges. A statute or regulation cannot be applied to a particular piece of property until it goes into effect. It is only when the rule has gone into effect that a plaintiff may have a ripe as-applied challenge. This may occur on the same day as enactment. In that case, however, it is the fact that the rule has gone into effect, and not the fact that it has been enacted, that makes it ripe on that day. Furthermore, as the Supreme Court has held, even the fact that a rule has gone into effect may not be sufficient to make ripe an as-applied challenge. See Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 187 (1985). This is seen most apparently where the rule is discretionary and the Court has required that a final decision adverse to the property holder is required to create a ripe claim. Id.

The Court in Williamson County explained that an as-applied challenge in the context of discretionary regulations is not ripe until the decision-making body has made a final decision with respect to how the regulation will affect the particular property in question. 473 U.S. at 187; see also Gerlach Livestock Co. v. United States, 76 F. Supp. 87, 97 (Ct. Cl. 1948) ("So long as it is conjectural whether or not defendant will actually take plaintiff's property, a taking has not occurred, but when conjecture ripens into a definitely asserted purpose and steps are taken to carry out that purpose, the taking may be said to have occurred."); cf. Franconia Assocs. v. United States, 122 S. Ct. 1993, 2002 (2002). However, where a discretionary

decision has not been sought, a facial challenge is still available. See Yee v. City of Escondido, 503 U.S. 519, 534 (1992).

Regulatory takings claims based on as-applied challenges have, in the past, focused on discretionary statutes or regulations, where the governmental authority has discretion to decide to whose property the regulation will apply. In those contexts, as the Supreme Court in Williamson County explained, the taking only occurs when the government makes a final decision with respect to the application of the rule to the particular property in question. Williamson County, 473 U.S. at 187. In some cases, like this one, the situation is different in that the regulation is not discretionary. See Cinega Gardens v. United States, 265 F.3d 1237, 1246 (Fed. Cir. 2001) ("Other cases cited by the Owners also conclude that where an agency has no discretion in the application of a contested regulation, an aggrieved party does not need to obtain a final decision from the agency determining the scope of the regulation."); Greenbrier v. United States, 193 F.3d 1348, 1359 (Fed. Cir. 1999) ("The failure to follow all applicable administrative procedures can only be excused in the limited circumstance in which the administrative entity has no discretion regarding the regulation's applicability and its only option is enforcement. . . . [I]n such circumstances, no uncertainty remains regarding the impact of the regulation . . . .") (citations omitted).

Where a rule is non-discretionary there is no doubt as to whose property it applies; here the rules applied to all tobacco vending machines. That does not mean, however, that to succeed on an as-applied challenge, the property owner need not show that the regulation has been applied to his property. It simply means that in most cases this showing will not be onerous because once the rule is in effect it has been "applied"

to that particular property. For a non-discretionary rule, a "final decision," required by Williamson County for an as-applied challenge, is made when the rule goes into effect.

In sum, facial challenges to statutes or regulations are ripe as of the enactment of the rule, but, as the Court stated in Keystone, are particularly hard to prove. As-applied challenges require a showing of application to the particular property in question. This requires that the decision-making body make a final decision as to the application of the rule to the particular piece of property, as the Supreme Court stated in Williamson County. For discretionary rules, this occurs after the property owner has sought and been denied a favorable decision from the governing body. For non-discretionary rules, application occurs once the rule goes into effect, whether that be on the date of enactment or some later date.[2] This later date may be statutory or regulatory, i.e. articulated in a rule, or it may be pragmatic, for example in a case where the rule simply cannot be applied until a particular time.

In this case, we are presented with an as-applied challenge to federal regulations. Plaintiffs continually assert that their particular contracts were taken as a result of enforcement of the FDA regulations. They have never asserted a broader, facial challenge to the regulations, and even if they had, such a challenge would be moot in the aftermath of Brown & Williamson. Therefore, our takings analysis in this case must conform to the requirements for proving an as-applied taking.

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[2] This may also occur where a court finds that it would be futile for a party to seek a discretionary decision, as in Cinega Gardens. 265 F.3d at 1248 (treating an as applied challenge to a discretionary rule as an as applied challenge to a non-discretionary rule where it was futile for a party to seek a discretionary decision because of evidence that the discretion would not be exercised).

Given that this case presents an as-applied challenge, the mere enactment of the regulations is not sufficient to create a taking. As we have already explained, mere enactment is sufficient only in the context of facial challenges. This conclusion is not affected by the fact that this regulation was not discretionary, as mere enactment is not sufficient for as-applied challenges regardless of whether or not they are discretionary. In this case, the FDA issued the final regulations on August 28, 1996, but the regulations were not scheduled to become effective until August 28, 1997. Therefore, as the trial court correctly determined, the earliest date that a taking could have commenced was August 28, 1997.

As this challenge is one of application, the next question is: When was the rule applied to the property at issue? The regulation at issue was not discretionary, and therefore, under normal circumstances would have been ripe for an as-applied takings challenge as of its effective date. However, this is not the typical case where "application" is easily proven, because in this case there is a serious question as to whether this self-executing, non-discretionary rule was "applied" to the particular piece of property, or to any vending machines whatsoever. Therefore, the essential question in this case is when, if ever, were the vending machine regulations in effect or "applied."

While the regulation was to go into effect on August 28, 1997, the appellants cannot assert a taking as of that date because on April 25, 1997, the United States District Court for the Middle District of North Carolina issued an injunction preventing the FDA from enforcing the regulations. Coyne Beahm, 966 F. Supp. at 1400-01. The district court's order encompassed the vending machine regulations when it stated: "IT IS FURTHER ORDERED that the Food

and Drug Administration shall not implement any of the additional Regulations set for implementation on August 28, 1997, pending further orders by the court." Id. We agree with the Court of Federal Claims that this order prevented the FDA from enforcing the regulations on a nationwide basis. The order's plain terms do not limit the injunction to a particular locale, and as the challenge to the regulation in Coyne Beahm was one of facial validity, and not one of application, there is no reason to read the order more narrowly. This stay essentially made the regulations unenforceable as of the date they were to take effect. Therefore, for purposes of the takings analysis, they were regulations which had not yet taken effect, and no taking could occur.

That the nationwide stay made the regulations ineffective, however, is a presumption that can be rebutted by appellants if they can demonstrate that after the date the regulations technically went into effect, August 28, 1997, the FDA actually took steps to enforce them, in violation of the court order. Hence, we are left with the subsequent question: Have the appellants created an issue of material fact as to whether the regulations were ever enforced so that they were "in effect"? The summary judgment would need to be reversed if the appellants had submitted sufficient evidence that the regulations had been enforced anywhere in the United States to create a genuine issue of material fact. See RCFC 56; cf. Brown v. United States, 73 F.3d 1100, 1105 (Fed. Cir. 1996) (reversing a grant of summary judgment because there were disputed issues of material fact). The trial court determined that the appellants failed to present any evidence that despite the injunction the regulations were actually enforced anywhere at anytime during this period.

Appellants assert that Congress appropriated funds for the FDA that the FDA used to enter into contracts

with the states to enforce the tobacco regulations by paying the states to perform the enforcement task. Appellants assert that the states were clearly agents of the federal government in the regulatory enforcement scheme. If that were so, the trial court would need to infer that the states, acting as agents for the federal government, enforced the regulations in contravention of the judicial stay against the FDA. This court, however, has previously rejected this agency argument with respect to the State of California in B & G Enterprises I, 220 F.3d at 1323-25, and it is to no avail here. We must follow the previous panel opinion of this court. Vas-Cath Inc. v. Mahurkar, 935 F.2d 1555, 1563, 19 USPQ2d 1111, 1117 (Fed. Cir. 1991) ("[W]e note that decisions of a three-judge panel of this court cannot overturn prior precedential decisions."). In B & G Enterprises I, this court explained that there could not be an agency relationship because an agency relationship "results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act." 220 F.3d at 1323 (citing Restatement (Second) of Agency § 1(1)). The court determined that there was no manifestation by either the federal government or the State of California of an intent to create an agency relationship under the facts of the case. Id. Appellants have not suggested that the federal government dealt with the other states differently than it did with California. As in B & G Enterprises I, appellants' agency argument is premised on federal funding grants given to the states. The court in B & G Enterprises I rejected that argument, stating:

First, both the Supreme Court and our predecessor court . . . have held that the federal government's conditioning a state or locality's receipt of federal funds on the state's taking a particular action does not make that state or locality an agent of the federal government. . . . [T]he conditional grant of funds to

California did not subject the federal government to liability for California's actions.

Id. at 1323-24 (citations omitted). There is no reason to depart from this court's earlier holding; no agency relationship could be present because the federal government evinced no intent to create one.

Appellants also challenge the trial court's finding that the FDA complied with the stay in the Coyne Beahm case. However, they have failed to present any evidence to support this claim, even a simple declaration from a witness stating that she knew from personal knowledge that the FDA had enforced the regulation.[3]

Appellants have not shown that any issue of disputed fact remains concerning whether the FDA enforced the regulations. Therefore, as the vending machine tobacco regulations were never "in effect," and now never will be in effect, we shall not disturb the trial court's grant of summary judgment. The tobacco regulations did not effectuate a taking of any of the appellants' property because they were never enforced.

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[3] Appellants rely on several declarations of operators of cigarette vending machines. While many of these declarations assert that state or local government officials pressured them to remove vending machines from certain locations, none of the declarations state that the FDA enforced the regulations at any point, much less after they were to become effective.

Appellants also rely on the declaration of Anne Kirchner, who worked in the Office of Policy of the FDA during the relevant period. Although appellants assert that her declaration is evidence of FDA's enforcement, the declaration explicitly states that the vending machines regulations were never enforced, and that only the age and identification regulations, which had not been stayed and had gone into effect earlier, were enforced.

II. Discovery

Appellants assert that the trial court erred in denying them discovery to determine whether or not the regulations were actually enforced at any time. In denying their motion to conduct discovery, the trial court noted that appellants had "produced absolutely no evidence to date to contradict the claim that the FDA did not enforce the tobacco vending machine regulations anywhere within the United States." A-1 Cigarette, No. 97-848C, slip op. at 2 (Ct. Fed. Cl. Nov. 15, 2000) (order denying discovery). Citing RCFC 56(g),[4] which governs whether a party opposing a motion for summary judgment should be entitled to take discovery prior to responding to the motion, the trial court noted that the party opposing the motion for summary judgment must file a sworn affidavit with the court stating the reasons that the party cannot respond to the motion without discovery. Id. at 2-3. The appellants in this case did not file such an affidavit. In denying the motion for discovery, however, the trial court relied more heavily on the absence of any support for the appellants' assertions of enforcement of the regulations. Id. at 3. The court properly noted that "[t]his court is not required to permit discovery based merely on the hope on the part of a plaintiff that it might find evidence to support its complaint." Id. (citations omitted).

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[4] RCFC 56(g) states:

Should it appear from the affidavits of a party opposing the motion that such party cannot for reasons stated present by affidavit facts essential to justify such party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or deposition to be taken or discovery to be had or may make such other order as is just.

This court has repeatedly addressed the question of when summary judgment can be granted in the absence of discovery. In Pure Gold, Inc. v. Syntex (U.S.A.), Inc., this court stated that "[s]ummary judgment need not be denied merely to satisfy a litigant's speculative hope of finding some evidence that might tend to support a complaint." 739 F.2d 624, 627, 222 USPQ 741, 744 (Fed. Cir. 1984). In Keebler Co. v. Murray Bakery Products, this court stated that "[a] party may not simply assert that discovery is necessary and thereby overturn summary judgment when it failed to comply with the requirement of Rule 56(f) to set out reasons for the need for discovery in an affidavit." 866 F.2d 1386, 1389, 9 USPQ2d 1736, 1739 (Fed. Cir. 1989) (citations omitted); accord Sweats Fashion, Inc., v. Pannill Knitting Co., Inc., 833 F.2d 1560, 1567, 4 USPQ2d 1793, 1799 (Fed. Cir. 1987) (citations omitted). Federal Rule of Civil Procedure 56(f), referred to in the quote from Keebler, is identical to RCFC 56(g), which applies in the Court of Federal Claims.

In this case, not only have appellants failed to demonstrate more than a "speculative hope" of finding evidence to support their claim of enforcement, they have also failed to avail themselves of the protection of RCFC 56(g) by not filing an affidavit explaining why they could not respond to the summary judgment motion without discovery. In light of appellants' failure to produce any evidence in support of their allegations, the trial court's denial of discovery was not an abuse of discretion.

CONCLUSION

For the foregoing reasons, the trial court's grant of summary judgment for the United States is affirmed.

AFFIRMED

COSTS

No costs.

BRUBAKER AMUSEMENT CO., INC., PAVLIC VENDING SERVICE, INC., AUTOMATED SERVICES, INC., B & G ENTERPRISES, LTD., A-1 CIGARETTE VENDING, INC., A&B CIGARETTE SERVICE, INC., A&H VENDING CO., INC., A. VAN BRACKEL & SONS, INC., ACE VENDING COMPANY, ADAMS & ADAMS, INC., ADVANCED VENDING CO., ADVANCED CIGARETTE SERVICE, AERO MERCHANDISING CORPORATION, AL FAINI VENDING, INC., ALL STAR AMUSEMENTS, ALLIANCE VENDING, INC., ANDERS VENDING SERVICE, ANDERSON GAMES CO., INC., APPLE VENDING CO., INC., ATLAS VENDING, AUTOMATIC MUSIC & VENDING CORPORATION, AUTOMATIC REFRESHMENT SERVICE, INC., AUTOMATIC VENDING SERVICE CORPORATION, AUTOMATIC MERCHANDISING CO., JAMES A. LEWIS D/B/A
B&H VENDORS, BALLARD VENDORS, BECKER ENTERPRISES, BIG STATE VENDING CO., INC., BLUE CHIP VENDING CO., BOB'S MUSIC & CIGARETTE VENDING, INC., C&N SALES CO., INC., CHUCK'S CIGARETTE & VENDING, CIGARETTE VENDING SERVICE OF DALLAS, INC., CLASS A VENDING, COIN-OPERATED VENDING CO., COLONIAL VENDING COMPANY, COMPREHENSIVE VENDING SALES, CT'S VENDING, INC., DEAN SUPERIOR VENDING CO., D.C. VENDING COMPANY, INC., DICARLO VENDING CO., DOLLAR, VENDING COMPANY, EDWARD J. ZARICK, INC. (doing business as ALL-STAR VENDING), ELLIS AMUSEMENT, INC., EMPIRE SMOKES, INC., FRED TOTERA VENDING, INC., GENERAL

VENDING SERVICES, INC., HAPPY HOUSE AMUSEMENTS, HAZELWOOD CORPORATION, HILLMAN VENDING CO., INC., HUGHES MUSIC COMPANY I.T. VENDING & NOVELTY CORPORATION, ISLE VENDING, INC., J&V COIN MACHINE CO., J.S. VENDING, INC., JRE, INC. (doing business as FM VENDING), K&R SERVICES, INC., KAY-CEE VENDING, INC., KENTON NOVELTY CO., INC., LARRY'S AMUSEMENT & VENDING CO., LOWELL VENDING CO., INC., M.J. WHITE, INC., MANNIE'S VENDING, MARK V. HANKS CIGARETTE VENDING, MELO-TONE VENDING, INC., MELODY VENDING SERVICE, MENDOTA VALLEY AMUSEMENT, INC., MIAMI VALLEY AUTOMATED ASSOCIATED, INC., MILLER AMUSEMENT & VENDING CO., MODERN CIGARETTE SERVICE, N.W. SERVICES, INC., NEWMAN AMUSEMENT, INC., NEWPORT MUSIC CO., INC., NORTHERN AMUSEMENT, INC., OHIO VENDING MACHINE, INC., OWEN MUSIC AND GAMES, PARAMOUNT VENDING, INC., PENN TRIPLE S T/A PENN VENDING COMPANY, PIEDMONT BOTTLING & VENDING CO., PIONEER VENDING, INC., PRIDE VENDING, INC., PSI VENDING II, QUALITY ENTERTAINMENT COMPANY, RELIABLE VENDING SERVICE, INC., RENDEZVOUS MUSIC & VENDING, ROY GEORGE MUSIC & VENDING CORPORATION, ROYAL VENDING COMPANY, RUSSEL-HALL AMUSEMENTS & VENDING, SHAFFER SERVICES, INC., STANSFIELD VENDING, INC., STATE MUSIC DISTRIBUTORS, INC., SUBURBAN VENDING, SUPERIOR VENDING CORPORATION, T.D. ROWE CORPORATION, TOTAL SERVICE CORPORATION, VGI VENDING, INC., VIDEO DISTRIBUTORS, INC., W.L. PERRY MUSIC CO., INC., WAYNE VENDING CORPORATION, WESTERN AUTOMATIC MUSIC, INC.,

WILLIAMS ENTERPRISES, INC., KRUEGER VENDING SERVICES, BRIAN SUEMNICHT (doing business as HOME SERVICE VENDING COMPANY), and ANDERSON VENDING & COFFEE SERVICE,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

MICHEL, Circuit Judge, concurring.

I join the result and the rationale that the majority ultimately relies on. I write separately only to specify my disagreement about reaching the distinction between as-applied takings and facial takings, a distinction that the majority treats at length. Ante at 9–12. As the majority itself notes, this distinction was never at issue in this case, and the plaintiffs never relied on the theory that the mere promulgation of the FDA's tobacco regulations could alone effectuate a constitutional taking. In my view, then, we simply have no occasion to search out and address this issue -- if only in dicta -- especially when the parties themselves have not done so. Prudence counsels in favor of leaving this discussion for another day.

In the United States Court of Federal Claims

Nos. 97-848C *et al.*
(Filed May 10, 2001)

* *

A- 1 CIGARETTE VENDING, INC., *et al.*, *
v. *
THE UNITED STATES, *
Defendant. *
*

* *

Douglas B. McFadden, Washington, DC, for the plaintiffs. *John M. Shoreman*, of counsel. *Mark A. Melnick*, Washington, D.C., with whom was *Assistant Attorney General David W. Ogden* for the defendant. *Katherine M. Kelly*, Department of Justice; *MargaretJane Porter* and *Karen E. Schifter*, Food and Drug Administration; and *Karen Wagner*, Department of Health and Human Services, of counsel.

OPINION

YOCK, *Senior Judge*.

Plaintiffs, A-1 Cigarette Vending, Inc. *et al.* ("plaintiffs"), representing several tobacco vending machine owner/operators, [5] filed a Complaint against the

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[5] On March 25, 1998, by Order of this Court, Case Nos. 98-208C, 98-209C, 98-210C, 98-211C, 98-212C, 98-213C, 98-214C, 98-215C, 98-216C, 98-217C, 98-218C, 98-219C, 98-220C, 98-221C, 98-222C, 98-223C, 98-224C, 98-225C, 98-226C, 98-227C, 98-228C, 98-229C, 98-230C, 98-231C, 98-232C, 98-233C, 98-234C, 98-235C, 98-236C, 98-237C, 98-238C, 98-239C, 98-240C, 98-241C, 98-242C, 98- 243C, 98-244C, 98-245C, 98-246C, 98-247C, 98-248C, 98-249C, 98-250C, 98-251C, 98-252C, 98-253C, 98-254C, 98-255C, 98-256C, 98-257C, 98-258C, 98-259C, 98-260C, 98-261C, 98-262C, 98-263C, 98-264C, 98-265C, 98-

United States ("defendant"), alleging that the Food and Drug Administration ("FDA" or the "agency") effected a temporary regulatory taking upon plaintiffs by promulgating certain tobacco regulations that were to ban the sale of cigarettes and smokeless tobacco from most vending machines. The FDA's tobacco regulations subsequently were held unauthorized and invalid by the United States Supreme Court in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). This matter is now before the Court on the defendant's Partial Motion to Dismiss. For the reasons set forth herein, the defendant's Partial Motion to Dismiss is GRANTED.

Background

The plaintiffs allegedly own and operate tobacco vending machine businesses. Amended Complaint (Am. Compl.) ¶ 2. According to the plaintiffs' Amended Complaint, the vendors locate tobacco vending machines in public facilities pursuant to placement contracts with the facility owners. *Id.* The plaintiffs assert that they earn revenue through the sale of cigarettes and tobacco products dispensed from their machines and through commissions paid by manufacturers to stock certain brands in the plaintiffs' machines. *Id.*

On August 11, 1995, the FDA issued proposed regulations "Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products To Protect Children and Adolescents," and an analysis of

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266C, 98-267C, 98-268C, 98-269C, 98-270C, 98-271C, 98-272C, 98-273C, 98-274C, 98-275C, 98-276C, 98-277C, 98-278C, 98-279C, 98-280C, 98-281C, 98-282C, 98-283C, 98-284C, 98-285C, 98-286C, 98-287C, 98-288C, 98-289C, 98-290C, 98-291C, 98-292C, 98-293C, 98-294C, 98-295C, 98-296C, 98-297C, 98-298C, 98-299C, 98-300C, 98-301C, 98-302C, 98-303; 98-508C, and 98-600C were all consolidated with the present case, No. 97-848C, for the purposes of pretrial motions common to all. Accordingly, this Opinion shall be deemed to apply to all of the aforementioned consolidated cases.

the agency's jurisdiction over such tobacco products. 60 Fed. Reg. 41,314, 41,453 (1995). The agency asserted that the objective of these proposed regulations was "to reduce the death and disease caused by tobacco products" by "preventing future generations from developing an addiction to nicotine-containing tobacco products." *Id.* at 41,314. The proposed regulations suggested various labeling requirements, promotional and advertising restrictions, and access restrictions to meet this objective. *Id.* at 41,315. Specifically, the agency proposed to "restrict the sale of cigarettes and smokeless tobacco products to individuals age 18 and older," and to "require retailers to verify the age of persons who wish to buy cigarettes or smokeless tobacco products * * *." *Id.* The FDA further proposed to completely "eliminate 'impersonal' methods of sale that do not readily allow age verification, such as mail orders, self-service displays, and vending machines." *Id.*

After receiving comments on the proposed regulations, the FDA published the final tobacco regulations on August 28, 1996. 61 Fed. Reg. 44,396 (1996) (codified at 21 C.F.R. pts. 801, 803, 804, 807, 820, and 897 (1997)). The final regulations contained specific labeling requirements,[6] promotional and advertising restrictions,[7] and access restrictions.[8] A

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[6] The labeling regulations mandated that cigarette and smokeless tobacco packages bear the established name of the product and a statement of intended use/age restriction. 21 C.F.R. §§ 897.24-.25.

[7] The FDA limited certain tobacco advertising to a text-only, black and white format; restricted the use of trade or brand name for tobacco products; and prohibited the use of a tobacco product brand name in connection with the sale or distribution of nontobacco promotional material and the sponsorship of sporting or other recreational events. 21 C.F.R. §§ 897.30, .32, .34.

[8] In addition to the provisions discussed hereafter, the access restriction regulations prohibited the

portion of the final access restriction regulations barred the sale of cigarettes or smokeless tobacco to anyone younger than 18 years of age and required retailers to verify a prospective purchaser's age by means of photographic identification. 21 C.F.R. § 897.14(a)-(b). These age and identification requirements became effective on February 28, 1997. *Id.* pt. 897 note.

The final regulations also contained certain restrictions on the sale of tobacco products from vending machines. Rather than banning the sale of cigarettes and smokeless tobacco from vending machines outright (as had been suggested by the proposed regulations), the final regulations merely limited the sale of tobacco products from vending machines to locations where no one under the age of 18 was present or allowed to enter at any time. 21 C.F.R. §§ 897.14(c), 897.16(c). These regulations provided, in pertinent part:

Vending machines, self-service displays, mail-order sales, and other "impersonal" modes of sale.

(1) Except as otherwise provided under this section, a retailer may sell cigarettes and smokeless tobacco only in a direct, face-to-face exchange between the retailer and the consumer. Examples of methods of sale that are not permitted include vending machines and self-service displays.

Exceptions. The following methods of sale are permitted:

(i) Mail-order sales, excluding mail-order redemption of coupons and distribution of free samples through the mail; and

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sale of cigarette packages containing fewer than 20 cigarettes and forbade the distribution of any free samples of cigarettes or smokeless tobacco. 21 C.F.R. §§ 897.16(b), (d).

(ii) Vending machines (including vending machines that sell packaged, single cigarettes) and self-service displays that are located in facilities where the retailer ensures that no person younger than 18 years of age is present, or permitted to enter, at any time.

21 C.F.R. § 897.16(c).

The vending machine regulations were scheduled to go into effect on August 28, 1997. *Id.* pt. 897 note.

In response to the FDA's final tobacco regulations, various tobacco companies, advertisers, and retailers brought suit against the FDA in the United States District Court for the Middle District of North Carolina, challenging the agency's authority to regulate tobacco under the Federal Food, Drug and Cosmetics Act ("FDCA"), Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended 21 U.S.C. §§ 301 *et seq.* (1994)). *See Coyne Beahm, Inc. v. FDA*, 966 F. Supp. 1374 (M.D.N.C. 1997). On April 25, 1997, the district court struck down the regulations restricting the advertising and promotion of tobacco products but upheld the FDA's authority to issue the access restriction regulations (including the age/identification requirements and the vending machine regulations).[9] *Id.* at 1400. Nevertheless, the court ordered that the FDA "shall not implement any of the additional Regulations set for implementation on August 28, 1997, pending further orders by the court." *Id.* at 1400-01. The tobacco vending machine restrictions were among the regulations covered by this stay. The defendant has asserted that the FDA respected the district court's order on a nationwide basis. Defendant's Partial Motion to Dismiss (Def.'s Partial Mot. to Dismiss) at 14-17; Kirchner Decl. ¶ 6.

[9] The district court also upheld the FDA's authority to issue certain labeling requirements for cigarettes and smokeless tobacco. The labeling regulations, however, are not at issue in the present case.

On August 14, 1998, the United States Court of Appeals for the Fourth Circuit issued an opinion reversing the *Coyne Beahm* decision, reasoning that the FDA was not authorized to regulate tobacco products under the FDCA. *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 176 (4th Cir. 1998). The United States Supreme Court granted *certiorari* on April 26, 1999. *FDA v. Brown & Williamson Tobacco Corp.*, 526 U.S. 1086 (1999). Finally, on March 21, 2000, the Supreme Court affirmed the judgment of the Fourth Circuit, holding that the FDA's tobacco regulations were not authorized by Congress and, therefore, were invalid. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

In the meantime, on December 15, 1997, the plaintiffs had filed a Complaint with this Court, claiming that the FDA's tobacco vending machine regulations had effected a permanent taking of plaintiffs' property. Compl. ¶ 1. The plaintiffs' case was stayed by this Court in its Order of April 21, 1998, pending the decision of the Fourth Circuit in *Brown & Williamson*. This stay subsequently was extended by Order of November 25, 1998, until all appeals were completed and a final decision was reached in the *Brown & Williamson* case. On May 18, 2000, after the Supreme Court's final decision in *Brown & Williamson*, 529 U.S. 120, this Court lifted its stay and, responding to a request from the plaintiffs, ordered the plaintiffs to file an amended complaint by June 5, 2000. On May 25, 2000, the plaintiffs filed their Amended Complaint with this Court, asserting two separate counts. Count I of the Amended Complaint asserted a temporary taking claim based on the FDA's tobacco regulations and the agency's alleged public campaign against the

plaintiffs.[10] Am. Compl. ¶¶ 19-23. The alleged time frame of this temporary taking began in 1994 with the FDA's purported "public campaign against the Plaintiffs,"continued with the agency's announcement of proposed tobacco regulations on August 11, 1995 and final tobacco regulations on August 28, 1996, and ended on March 21, 2000, the date that the regulations were declared invalid by the Supreme Court. Am. Compl. ¶¶ 21. Count II of the Amended Complaint asserted a taking claim based on the United States Department of Health and Human Services' (HHS's) implementation of the Alcohol, Drug Abuse and Mental Health Reorganization Act, Pub. L. No. 102-321, 106 Stat. 323 (1992) (codified at 42 U.S.C. §§ 300x-21, 300x-26 (1994)). Am. Compl. ¶ 24- 30. More specifically, plaintiffs alleged in Count II that the various states were acting as agents of the Federal Government in restricting the sale of tobacco products from vending machines in order to obtain block grants from HHS. This Court dismissed this so-called state action argument in a related case, *B&G Enterprises v. United States*, 43 Fed. Cl. 523 (1999), *aff'd*, 220 F.3d 1318 (Fed. Cir. 2000), *cert. denied*, 121 S. Ct. 956, 148 L. Ed. 2d 956 (2001), and, as a result, proceedings in this case with respect to Count II of the Amended Complaint were stayed pending the final disposition of any and all appeals in *B&G Enterprises*. On February 20, 2001, the Supreme Court denied *certiorari* in *B&G Enterprises*, and on February 22, 2001 the plaintiffs moved this Court to

[10] Plaintiffs have been inconsistent as to their position on when the alleged temporary taking began. In Plaintiffs' Brief in Opposition to Defendant's Partial Motion to Dismiss, the plaintiffs' alleged, contrary to the Amended Complaint, that the temporary taking began on August 11, 1995 (the date that the FDA issued the proposed tobacco regulations), but then added that this case involves "an erosion or creeping taking by the Government" that actually started on March 31, 1993, with the promulgation of the HHS regulations discussed in Count II. Pls.' Opp'n Br. at 7-8. Because Count II has been previously dismissed by this Court, *see infra* pp. 7-8, but in order to afford the broadest consideration of plaintiffs' possible claims, this Court will treat the alleged temporary taking as beginning in 1994, consistent with the Amended Complaint. *See* Am. Compl. ¶ 21.

dismiss Count II. Accordingly, Count II of the Amended Complaint was dismissed by Order of March 2, 2001.[11] At present, only Count I remains before this Court.

On August 3, 2000, the defendant filed Defendant's Partial Motion to Dismiss. The defendant argued that Count I of the Amended Complaint must be dismissed because: (a) the Supreme Court's holding in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, that the FDA did not possess regulatory authority over tobacco products, precluded plaintiffs' recovery; (b) the mere consideration of a regulation, short of implementation, is not a taking, and the FDA never implemented the vending machine regulation; and (c) there was no taking as a matter of law. The plaintiffs filed their Opposition Brief (Pls.' Opp'n Br.) on December 5, 2000,[12] and the defendant responded on January 4, 2000.

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[11] This Court subsequently extended the dismissal of Count II to several other cases that had been consolidated with this case for the purposes of pretrial motions common to all. *See* Order of March 15, 2001 (dismissing Count II in Case Nos. 98-208C, 98-209C, 98-210C, 98-211C, 98-212C, 98-213C, 98-214C, 98-215C, 98-216C, 98-217C, 98-218C, 98-219C, 98-220C, 98-221C, 98-222C, 98-223C, 98-224C, 98-225C, 98-226C, 98-227C, 98-228C, 98-229C, 98-230C, 98-231C, 98-232C, 98-233C, 98-234C, 98- 235C, 98-236C, 98-237C, 98-238C, 98-239C, 98-240C, 98-241C, 98-242C, 98-243C, 98-244C, 98-245C, 98-246C, 98-247C, 98-248C, 98-249C, 98-250C, 98-251C, 98-252C, 98-253C, 98-254C, 98-255C, 98-256C, 98-257C, 98-258C, 98-259C, 98-260C, 98-261C, 98-262C, 98-263C, 98-264C, 98-265C, 98-266C, 98-267C, 98-268C, 98-269C, 98-270C, 98-271C, 98-272C, 98-273C, 98-274C, 98-275C, 98-276C, 98- 277C, 98-278C, 98-279C, 98-280C, 98-281C, 98-282C, 98-283C, 98-284C, 98-285C, 98-286C, 98-287C, 98-288C, 98-289C, 98-290C, 98-291C, 98-292C, 98-293C, 98-294C, 98-295C, 98-296C, 98-297C, 98-298C, 98-299C, 98-300C, 98-301C, 98-302C, and 98-303C); Order of April 13, 2001 (dismissing Count II in Case Nos. 98-508C, 98-514C, and 98-600C).

[12] The plaintiffs also filed a Verified Motion to Conduct Discovery ("Plaintiffs' Discovery Motion") on August 10, 2000. In the Plaintiffs' Discovery Motion, the plaintiffs moved for leave to conduct discovery regarding the allegation, found in part IIB of the Defendant's Partial Motion to Dismiss, that the FDA never enforced the tobacco vending machine regulations. The plaintiffs asserted that such factual assertions converted the Defendant's Partial Motion to Dismiss, or at least that portion of the motion, into a motion for summary judgment and claimed that the

"information needed to respond [to such allegations] is largely in the hands of the Government." Plaintiffs' Discovery Motion at 2-3. The defendant opposed the Plaintiffs' Discovery Motion, arguing that the plaintiffs failed to demonstrate any basis for such discovery under RCFC 56(g). The plaintiffs did not file a reply to the defendant's opposition. Both parties appeared before this Court on October 17, 2000, and on October 31, 2000, for oral arguments on the Plaintiffs' Discovery Motion. The Plaintiffs' Discovery Motion was denied by the Court's Order on November 15, 2000.

Discussion

I. The FDA Did Not Possess the Authority to Regulate Tobacco Under the FDCA.

The defendant argues that Count I of the plaintiffs' Amended Complaint must be dismissed because the FDA did not have the authority under the FDCA to issue the tobacco vending machine regulations. *See* Def.'s Partial Mot. to Dismiss at 19-37. In summary, the defendant asserts that the Supreme Court's holding in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), establishes that Congress never gave the agency the authority to regulate cigarettes and smokeless tobacco. Accordingly, because the FDA never possessed the authority to regulate such products, no compensable taking could arise. This Court agrees that the Supreme Court's holding in *Brown & Williamson* clearly establishes that the agency lacked the authority to issue the tobacco vending machine regulations and therefore holds that Count I of the plaintiffs' Amended Complaint must be dismissed for this reason.

Rule 12(b)(4) of the United States Court of Federal Claims (RCFC) permits a defendant to file a motion to dismiss for failure to state a claim upon which relief may be granted prior to filing its answer.[13] RCFC 12(b)(4). In ruling on a motion to dismiss pursuant to RCFC 12(b)(4), the allegations contained in the complaint will be construed in favor of the plaintiffs. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Perez v. United States*, 156 F.3d 1366, 1370 (Fed. Cir. 1998); *Davies Precision Mach., Inc. v.*

[13] RCFC 12(b)(4) is this Court's equivalent to Federal Rule of Civil Procedure 12(b)(6). *See Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001).

United States, 35 Fed. Cl. 651, 662 (1996). The motion will not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). *See also Trauma Serv. Group v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997). However, mere conclusory allegations of law and unsupported inferences of fact will not withstand a motion to dismiss. *Bradley v. Chiron Corp.*, 136 F.3d 1317, 1321 (Fed. Cir. 1998).

The Fifth Amendment to the United States Constitution provides that the Government must pay just compensation if it takes private property for public use. U.S. Const. amend. V. This Court generally has jurisdiction over claims for compensation arising from an alleged taking pursuant to the Tucker Act. 28 U.S.C. § 1491 (1994) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded * * * upon the Constitution * * *."). It is well settled that a compensable taking may be effectuated by governmental regulation. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co.*, 260 U.S. at 415. *See also M&J Coal Co. v. United States*, 47 F.3d 1148, 1153-54 (Fed. Cir.), *cert. denied*, 516 U.S. 808 (1995). Even if a regulation only denies an owner the use of his property for a finite period of time, the Fifth Amendment requires the payment of just compensation. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318 (1987); *Marks v. United States*, 34 Fed. Cl. 387, 406-07 (1995), *aff'd*, 116

F.3d 1496 (Fed. Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998). Such "temporary reversible takings should be analyzed in the same constitutional framework applied to permanent irreversible takings * * *." *Yuba Natural Res., Inc. v. United States*, 821 F.2d 638, 641 (Fed. Cir. 1987). *See also First English*, 482 U.S. at 318; *Bass Enters. Prod. Co. v. United States*, 133 F.3d 893, 896 (Fed. Cir. 1998).

It is also well settled, however, that a compensable taking arises only if the Government's conduct in question was authorized. *See United States v. North Am. Transp. & Trading Co.*, 253 U.S. 330, 333 (1920); *Del Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1362 (Fed. Cir. 1998); *Coast Indian Cmty. v. United States*, 213 Ct. Cl. 129, 147, 550 F.2d 639, 649 (1977). *See also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) ("[p]rior cases in this Court have cast doubt on the right to recover in the Court of Claims on account of properties unlawfully taken bygovernment officials for public use * * *."). In order for the United States to be liable for an alleged taking, the officials responsible for causing the taking must have been "duly authorized" to effectuate the taking, "either directly by Congress or by the official upon whom Congress conferred the power." *North Am. Transp. & Trading Co.*, 253 U.S. at 333. *See also Regional Rail Reorganization Cases*, 419 U.S. 102, 127 n.16 (1974) ("'The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the Government,' and hence recovery is not available in the Court of Claims.") (quoting *Hooe v. United States*, 218 U.S. 322, 336 (1910)); *Southern Calif. Fin. Corp. v. United States*, 225 Ct. Cl. 104, 108, 634 F.2d 521, 523 (1980), *cert. denied*, 451 U.S. 937 ("it is imperative that, before a compensable taking can be found by the court, there must be some congressional

authorization, express or implied, for the particular taking claimed"). Congressional authority is an indispensable requirement of any taking claim brought before this Court. The Tucker Act provides this Court with jurisdiction over takings claims because they are founded "upon the Constitution"; claims based on executive actions that were not authorized by Congress, however, are not claims founded "upon the Constitution" but rather are claims based on executive actions taken in violation of the Constitution. *Hooe*, 218 U.S. at 335-36. *See also Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 898 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987); *Armijo v. United States*, 229 Ct. Cl. 34, 42-43, 663 F.2d 90, 95 (1981); *NBH Land Co. v. United States*, 217 Ct. Cl. 41, 44, 576 F.2d 317, 319 (1978). Thus, a compensable takings claim cannot arise from executive actions that were wholly unauthorized by Congress.

The Supreme Court's holding in *FDA v. Brown & Williamson*, 529 U.S. 120 (2000), foreclosed the possibility of treating the FDA's tobacco regulations as authorized by Congress. In *Brown & Williamson*, the Supreme Court held that the FDA had no authority to regulate cigarettes and smokeless tobacco products as commonly marketed under the FDCA. According to the Supreme Court, Congress has *clearly precluded* the FDA from asserting jurisdiction to regulate tobacco products. Such authority is inconsistent with the intent that Congress has expressed in the FDCA's overall regulatory scheme and in the tobacco-specific legislation that it has enacted subsequent to the FDCA. In light of this clear intent, the FDA's assertion of jurisdiction is impermissible. *Id.* at 126 (emphasis added).

The Supreme Court recognized the serious nature of the problem that the FDA sought to address (smoking by adolescents) but observed that "an administrative

agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *Id.* at 161. Not only was there no valid grant of authority, but further, the Supreme Court held that "Congress has *directly spoken* to the question at issue and *precluded* the FDA from regulating tobacco products." *Id.* at 160-61 (emphasis added). Despite the Supreme Court's unambiguous statement that the FDA lacked the authority to regulate cigarettes and smokeless tobacco, the plaintiffs assert that they still may maintain their temporary takings claim because the FDA was acting in "good faith" and within the scope of its general authority. The plaintiffs rely upon a Federal Circuit decision, *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1362 (Fed.Cir. 1998) for the proposition that even unauthorized Government actions that interfere with property rights require the payment of compensation by the Federal Government, so long as such actions are taken in good faith or are within the agency's general area of authority. Pls.' Opp'n Br. at 8. The plaintiffs contend that "[t]he issue is not that the FDA lacked authority, but rather if it exceeded that authority." *Id.* at 9. The plaintiffs, however, misinterpret *Del-Rio*. Even under *Del-Rio*, an agency still must have the general authority, express or implied, to issue a regulation in order for the agency's action to effect a takings. 146 F.3d at 1362. *Del-Rio* did not abolish the authority requirement, so much as it helped define the scope of an agency's implied authority for the purposes of the takings analysis.

In *Del-Rio*, federal gas and oil lessees brought suit against the United States for takings and breach of contract. 146 F.3d at 1360. The United States Department of the Interior (the "Department") had denied to lessees the drilling permits that were necessary to access their previously conveyed mineral leases. *Id.* The Department based this denial upon the

lessees' failure to obtain rights-of-way from the Indian tribe on whose reservation lessees sought to drill. *Id.* The Department justified this tribal consent prerequisite in reliance upon the Tribal Consent Act, 25 U.S.C. §§ 323-324 (1994). 146 F.3d at 1361. On motion for summary judgment, the trial court held that the lessees needed to assert that the Department's reliance on the Tribal Consent Act was legally erroneous, or else the consent requirement would have been an encumbrance upon the mineral leases from the outset. *Del-Rio Drilling Programs, Inc. v. United States*, 37 Fed. Cl. 157, 162 (1997). However, the trial court also observed that if reliance upon the Tribal Consent Act was legally erroneous, the lessees takings claim would disappear, because the Department would have no authority to require consent. *Id.* Thus, the lower court dismissed the lessees takings claim.[14]

On appeal, the Federal Circuit reversed and remanded the trial court's decision. The Federal Circuit stressed that a compensable taking will not arise unless the Government's action in question is authorized, but observed that:

> In a case such as this one, in which the alleged taking consists of regulatory action that deprives a property-holder of the enjoyment of property, government agents have the requisite authorization if they act within the general scope of their duties, *i.e.*, if their actions are a "natural consequence of Congressionally approved measures," *NBH Land Co. v. United States*, 217 Ct. Cl. 41, 576 F.2d 317, 319 (1978), or are pursuant to "the good faith implementation of a Congressional Act," *Southern Cal.Fin. Corp. v. United States*, 225 Ct. Cl. 104, 634 F.2d 521, 525 (1980). The principle underlying this rule is that when a government official engages in *ultra vires* conduct,

[14] The trial court further dismissed the lessees' contract claim. *Id.* at 162-63.

the official "will not, in any legal or constitutional sense, represent the United States, and what he does or omits to do, without the authority of Congress, cannot create a claim against the Government 'founded upon the Constitution.'" *Hooe v. United States*, 218 U.S. 322, 335, 31 S. Ct. 85, 54 L. Ed. 1055 (1910).

Del Rio, 146 F.3d at 1362. The Federal Circuit was careful to note that "the InteriorDepartment officials who denied drilling permits to Del-Rio and advised Del-Rio that it had to obtain rights-of-way from the Ute tribe were acting within the scope of their statutorily authorized duties." *Id.* at 1363. Because the Interior Department had the general authority to regulate mining permits, the takings claim could not be dismissed for a lack of authority.[15]

In the case at bar, however, the Supreme Court already has held that the FDA had no authority to regulate cigarettes or smokeless tobacco as commonly marketed. While the plaintiffs correctly observe that the FDA has the authority to regulate food and drugs under the FDCA, this is ultimately irrelevant to the question of whether or not the agency has the authority to regulate tobacco products. The Supreme Court has held that "there is no room" for the regulation of cigarettes or smokeless tobacco within the structure of the FDCA and that tobacco products "simply do not fit" under the agency's regulatory umbrella. *Brown & Williamson*, 529 U.S. at 143. The FDA's actions were *ultra vires*, and such conduct will not lead to a compensable taking claim. *See Del Rio*, 146 F.3d at 1362-63. Finally, while the Department of Interior made a legal error in determining whether or

[15] In *Rith Energy, Inc. v. United States*, the Federal Circuit recently reaffirmed that *Del Rio* requires that agency actions be authorized in order to effectuate a valid takings claim. 2001 WL 456511, *8 (Fed. Cir. 2001) ("a takings claim lies, *as long as* the government's action was authorized * * *.") (emphasis added).

not it should take the Tribal Consent Act into consideration during the permitting process in *Del Rio*, the FDA made a far more serious mistake in construing its own jurisdiction in the present case. When a legal error is committed by an agency regarding the question of the agency's own jurisdiction to regulate, such error will be more likely to implicate the question of whether or not an agency had the proper authority to regulate. In this case, the FDA clearly did not have the proper general authority to regulate.

In the alternative, the plaintiffs claim that because Congress specifically appropriated money for the enforcement of the FDA regulations, such appropriation served as congressional authorization of the FDA's tobacco regulations. Pls.' Opp'n Br. at 10-11. The plaintiffs cite to *Hooe v. United States*, 218 U.S. 322 (1910), in support of this proposition. The plaintiffs, however, both misread *Hooe* and mischaracterize the nature of the congressional appropriation to the FDA. Indeed, while *Hooe* provides further clear support for the proposition that an action by an agency must be congressionally authorized in order for it to constitute a taking, it does not support the blanket proposition that an appropriation serves as authorization.

In *Hooe*, Congress had specifically appropriated a certain sum of money to be used as full rent for the office space used by the Civil Service Commission (the "Commission"). 218 U.S. 322, 327-30. Congress further provided that no Government agency could contract for the rental of property without such an appropriation and forbade agencies to contract to spend in excess of such appropriations. *Id.* at 331. The owner of the building leased by the Commission, however, brought a takings claim against the United States to recover the difference between the appropriated rent and the fair rental value of the

building (including the basement), asserting that the Commission had occupied the basement of his building without his consent. *Id.* at 326-27, 335. The Supreme Court held that the occupancy of the basement by the Commission was not authorized by Congress, and therefore the Court disallowed a recovery by the building owner. The Supreme Court stated, in pertinent part, It cannot be said that any claim for a specific amount of money against the United States is founded on the Constitution, *unless such claim be either expressly or by necessary implication authorized by some valid enactment of Congress.* * * * If an officer of the United States assumes, by virtue alone of his office, and *without the authority of Congress*, to take such matters under his control, he will not, in any legal or constitutional sense, represent the United States, and what he does or omits to do, without the authority of the Congress, cannot create a claim against the government, "founded upon the Constitution." It would be a claim having its origin in a violation of the Constitution. The constitutional prohibition against taking private property for public use without just compensation is directed against the government, and not against individual or public officers proceeding without the authority of legislative enactment. *The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, is not the act of the government. Id.* at 335-36 (emphasis added) (footnote omitted).

Hooe provides clear support for the proposition that a takings claim cannot arise when an agency acts without congressional authority. It does not, however, hold that an appropriation alone is enough to create authority within an agency. While the failure to appropriate money was an important factor in *Hooe* in determining that the Commission had no authority to occupy the basement of the building, this failure to

appropriate was significant primarily in the context of the legislation forbidding an agency to rent without a specific appropriation. Congress effectively denied the Commission the authority to occupy office space without a specific appropriation for that purpose and only permitted the Commission to obligate the United States for rent up to the amount allocated. In the context of such legislation, the Commission's occupation of the basement was an *ultra vires* act.

Moreover, simply because the lack of an appropriation demonstrates a lack of authority does not mean that an appropriation by itself will create such authority. The Supreme Court has held that a general appropriation of funds for an overall program is not sufficient to bestow authority upon a particular aspect of an agency's program. *Ex Parte Endo*, 323 U.S. 283, 303 n.24 (1994). *See also D.C. Fed'n of Civic Ass'ns, Inc. v. Airis*, 391 F.2d 478, 481-82 (D.C. Cir. 1968) (Congress' general knowledge that a particular freeway project was being planned or a general intention to advance the freeway system as a whole was insufficient to support ratification by appropriation). This is especially true where there is a pre-existing law that determines the scope of an agency's authority, such as the FDCA. While appropriations are "Acts of Congress" that may change the existing law, there is a strong presumption that they do not. *See TVA v. Hill*, 437 U.S. 153, 190 (1978). This is not to say that an appropriation may not constitute a ratification or change in an agency's authority, only that an appropriation does not automatically translate to authorization. *See, e.g., Brooks v. Dewar*, 313 U.S. 354, 361 (1941) (holding that repeated appropriations of the proceeds of certain fees constituted a ratification of agency policy). An appropriation, however, must "plainly show a purpose to bestow the precise authority which is claimed." *Ex Parte Endo*, 323 U.S. at 303 n.24.

Congress, however, explicitly specified that its appropriation to fund the FDA's implementation of the tobacco regulations did not authorize the agency's tobacco regulations. The 1997 Senate Report regarding the FDA's appropriations specifically stated:

> Given that FDA's assertion of jurisdiction over tobacco products is pending before the Federal courts, and a settlement proposal is pending before the Congress, the Committee does not provide the $29,086,000 increase requested for additional outreach activities and for enforcement grants to States. The Committee emphasizes that *its action is in no way to be construed as concurring or disagreeing with any court ruling regarding FDA's authority to implement its tobacco rule* or the proposed tobacco settlement.

S. REP. NO. 105-51 at 117 (1997) (emphasis added). Both the 1998 and 1999 Senate Reports regarding the FDA's appropriations also stated that any appropriation for the FDA's tobacco programs was "in no way to be construed as concurring or disagreeing with any court ruling regarding FDA's authority to implement its tobacco rule * * *." S.REP. NO. 105-212 (1998); S. REP. NO. 106-80 (1999). Thus, even in appropriating money for the FDA's tobacco program, Congress explicitly disclaimed that such appropriation should be read as authorizing the tobacco regulations.

Our conclusion in this matter regarding the defendant's authority argument is consistent with the prior opinions of this Court in two closely-related cases: *A-1Amusement Co., et al. v. United States*, 48 Fed. Cl. 63 (2000) (J. Hewitt), *appeal docketed*, No.

01-5085 (Fed. Cir. Apr. 16, 2001),[16] and *Brubaker Amusement Co., Inc. v. United States*, No. 98-511C (January 12, 2001) (J. Weinstein), *appeal docketed*, No. 01-5070 (Fed. Cir. Mar. 19, 2001) . In both *A-1 Amusement* and *Brubaker Amusement*, this Court dismissed tobacco vending machine owner/operators' takings claims against the United States for failure to state a claim upon which relief may be granted to the extent that such claims were based on the FDA's tobacco regulations.[17] This Court reasoned that the Supreme Court clearly held in *Brown & Williamson* that the FDA lacked the authority to promulgate the tobacco regulations and that, without such authority, there could be no takings claims. In *A-1 Amusement*, for example, this Court held that the plaintiffs' position that the FDA's conduct was unauthorized, but lawful, was "untenable." 48 Fed. Cl. at 68. Similarly, the Court held in *Brubaker Amusement* that the "FDA's actions [in promulgating the tobacco regulations] were clearly outside the scope of their duties and therefore ultra vires." *Brubaker Amusement*, No. 98-511C at 7. In neither case did this Court hold that the FDA had any statutory authority to issue the tobacco regulations.

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[16] The plaintiffs in *A-1 Amusement* failed to file a timely appeal of the final judgment as to Count I. Accordingly, an Order to Show Cause was issued in two other tobacco vendor cases before the same judge, and these two cases were subsequently dismissed. *Automated Servs. v. United States, Inc.*, 48 Fed. Cl. 50 (2001), *appeal docketed*, No. 01-5084 (Fed. Cir. Apr. 16, 2001); *Pavlic Vending Servs., Inc. v. United States*, 48 Fed. Cl. 842 (2001), *appeal docketed.*, No. 01-5083 (Fed. Cir. Apr. 16, 2001). Despite the apparent failure to file a timely appeal as to Count I, an appeal has since been docketed in *A-1 Amusement*, No. 01-5085 (Fed. Cir. Apr. 16, 2001).

[17] On March 22, 2001, this Court also dismissed another tobacco vending machine owner/operator's takings claim that had been premised on the FDA's regulations for a different reason. *See B&G Enters. v. United States*, 48 Fed. Cl. 866 (2001) (J. Hodges), *appeal docketed*, No. 01-5080 (Fed. Cir. Apr. 9, 2001). The *B&G Enterprises* March 22, 2001 decision is discussed further in Part II of this Opinion. *See infra* p. 33.

For the above-stated reasons, Count I of the plaintiffs' Amended Complaint must be dismissed. The Supreme Court determined in *Brown & Williamson* that the FDA had no authority to regulate cigarettes and smokeless tobacco as commonly marketed, and, therefore, no compensable taking may arise.

II. Mere Consideration of a Regulation, Short of Implementation, Cannot Effectuate a Taking, and the Vending Machine Regulations Were Never Implemented.

The FDA's lack of authority to regulate cigarettes and smokeless tobacco, as customarily marketed, provides an adequate and independent ground for dismissing Count I of the Amended Complaint. However, the defendant also argues that the plaintiffs would be precluded from making their takings claims because the mere consideration, short of implementation, of a regulation does not give rise to a valid takings claim, and the FDA never implemented the vending machine regulations. Def.'s Partial Mot. to Dismiss at 37-42. As a matter of law, this Court agrees that the mere consideration of a regulation cannot give rise to a takings claim and that the plaintiffs cannot assert a takings claim prior to the effective date of the tobacco regulations. In light of the stay on enforcement of the access restrictions issued by the United States District Court for the Middle District of North Carolina in *Coyne Beahm, Inc. v. FDA*, 966 F. Supp. 1374, 1400-01 (M.D.N.C. 1997), the clear evidence of nonenforcement, and the plaintiffs' failure to produce any evidence tending to indicate any enforcement of the vending machine regulations by the FDA, this Court further finds that even after the effective date of implementation there was no enforcement of the tobacco vending machine regulations. Therefore, Count I of the Amended Complaint should be dismissed on this ground, even if the authority argument were to fail.

In their Amended Complaint, the plaintiffs assert that the defendant effected a temporary taking of their property for a period commencing in 1994 and ending with the March 21, 2000 decision of the Supreme Court in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).[18] Am. Compl. ¶ 21. The FDA, however, did not even issue its proposed regulations regarding cigarettes and smokeless tobacco until August 11, 1995. 60 Fed. Reg. 41,314 (1995). *See also* Am. Compl. ¶ 7. The FDA's final tobacco regulations were published approximately one year later, on August 28, 1996. 61 Fed. Reg. 44,396 (1996). *See also* Am. Compl. ¶ 8. Further, the tobacco vending machine regulations at issue were not scheduled to go into effect until August 28, 1997. 21 C.F.R. pt. 897 note. The plaintiffs attempt to expand the period that the FDA allegedly effected a temporary taking by beginning their countdown with the date that the FDA purportedly started its "public campaign against the Plaintiffs." Am. Compl. ¶ 21. As a matter of law, however, the earliest date that a takings could have commenced in this situation was on August 28, 1997, the date the regulations were scheduled to go into effect.

The Supreme Court has held that the "mere enactment of legislation which authorizes the condemnation of property cannot be a taking. Such legislation may be repealed or modified, or appropriations may fail." *Danforth v. United States*, 308 U.S. 271, 286 (1939). *See also Willink v. United States*, 240 U.S. 572, 579-80 (1916). While the Supreme Court in *Danforth* was addressing the enactment of congressional legislation, the same logic may be applied to the promulgation of a regulation by an administrative agency. A regulation may be repealed or modified, stayed or invalidated, or superceded by congressional act prior to

[18] *See supra* note 6.

implementation. A takings claim only lies to the extent that a regulation results in an actual Government restriction on or interference with property.

The mere assertion of jurisdiction by an agency and the issuing of proposed regulations cannot effect a taking. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-27 (1985) (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 293-97 (1981)) (the mere assertion of regulatory jurisdiction does not constitute a regulatory taking). Such proposed regulations merely provide notice of an agency's intended plans and "[m]ere candor by public officials about their plans has never been held to constitute a taking. Even 'a threat of condemnation is not a taking * * *.'" *NBH Land*, 217 Ct. Cl. at 44, 576 F.2d at 319 (quoting *Hempstead Warehouse Corp. v. United States*, 120 Ct. Cl. 291, 306, 98 F. Supp. 572, 573 (1951)).[19] *See also Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 15 (1984). Similarly, the publication of final regulations, which have an effective date subsequent to publication cannot be a taking. The regulations may be repealed or modified, stayed or invalidated, or superceded by congressional act prior to actual implementation. Only a Government regulatory act that actually restricts property may effectuate a taking. *See MacDonald, Summer & Frates v. Yolo County*, 477 U.S. 340, 348-51, *reh'g denied*, 478 U.S. 1035 (1986) (requiring final agency application of regulatory restrictions before a taking will have occurred).

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[19] In January 1997, a letter signed by Dr. David Kessler, Commissioner of the FDA, was sent by the FDA to various businesses with placement contracts with the plaintiffs. The letter advised the businesses of the new regulations. The FDA also distributed a booklet prepared on February 20, 1997, describing the enforcement of the tobacco regulation. However, under the logic employed above, neither the letter nor the booklet can be held to effectuate a taking.

The plaintiffs' allege that the pending tobacco regulations caused numerous facility owners to cancel their tobacco vending machine placement contracts with the plaintiffs. The mere fact that the marketplace may have reacted to the impending regulations, however, is irrelevant for the purposes of the takings analysis. In *NBH Land*, for example, military officers had divulged to local officials that the Army planned to expand a military facility in Colorado. This allegedly caused a decrease in the value of certain lots that were to be subject to condemnation. Nevertheless, the United States Court of Claims held that the real estate market's reaction to the planned condemnation did not give rise to a takings claim. The risks of the market prior to an actual taking are traditionally borne by the owner of the property, as "incidents of ownership" and accordingly the reactions of third parties cannot be considered as effecting a taking. *Danforth*, 308 U.S. at 285.

Thus, this Court holds that the earliest date that a takings may have commenced in this situation was August 28, 1997, the date the regulations were scheduled to go into effect.

The defendant, however, asserts in Part IIB of the Partial Motion to Dismiss that the FDA never actually enforced the tobacco vending machine regulations, because of a stay order issued by the United States District Court for the Middle District of North Carolina on April 25, 1997. Def.'s Partial Mot. to Dismiss at 41-42. *See Coyne Beahm, Inc. v. FDA*, 966 F. Supp. 1374, 1397-1401 (M.D.N.C. 1997). In addition to highlighting the *Coyne Beahm* order, the defendant has supplied this Court with additional documents confirming that the FDA abided by the stay on a national basis. To the extent that Part IIB relies upon evidence beyond the allegations of the Complaint, the Court finds that this portion of the Partial Motion to Dismiss, and this portion alone, is

more properly characterized as a motion for summary judgment under RCFC 56.

Pursuant to RCFC 56, summary judgment will be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(c). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A dispute over a material fact is one that might affect the outcome of the suit under governing law. *See Anderson*, 477 U.S. at 248. This Court will not grant summary judgment if the dispute about a material fact is one in which a reasonable factfinder could return a verdict for a nonmoving party. *See id.* At the same time, summary judgment will not be treated as "a disfavored procedural shortcut," for it serves an important role in dismissing "factually insufficient claims or defenses." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

The party that brings the motion for summary judgment (here the defendant) bears the initial burden of demonstrating the lack of an issue of material fact. *Celotex Corp.*, 477 U.S. at 323. After the moving party has demonstrated the absence of a material fact, the burden shifts to the party opposing the motion (here the plaintiffs) to demonstrate that an issue of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153, 159-61 (1970); *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 289, *reh'g denied*, 393 U.S. 901 (1968). The Court must resolve any doubts about factual issues in favor of the nonmoving party, *Litton Indus. Prods. Inc. v. Solid State Sys. Corp.*, 755 F.2d 158, 163 (Fed. Cir. 1985), to whom the benefits of all favorable inferences and presumptions run. *See H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1574 (Fed. Cir. 1984), *cert. denied*, 474 U.S. 818 (1985).

Nevertheless, "[a] party opposing summary judgment 'must do more than whet the curiosity of the court; he must support vague accusations and surmise with concrete particulars.'" *Crawford v. United States*, 3 Cl. Ct. 323, 328 (1983) (quoting *Applegate v. Top Assocs., Inc.*, 425 F.2d 92, 96 (2d Cir. 1970)), *aff'd*, 732 F.2d 168 (Fed. Cir.) (table), *cert. denied*, 469 U.S. 861 (1984). Indeed, by signing a complaint, motion, or other paper filed by a party, an attorney certifies that the allegations contained therein were formed after a reasonable inquiry and are well grounded in fact. RCFC 11. In the present case, this Court finds that the defendant has met its initial burden of demonstrating the lack of a dispute of material facts with regard to the FDA's nonenforcement of the tobacco vending machine regulations. Thus, the burden has shifted to the plaintiffs, who must demonstrate some plausible basis for their belief that the FDA enforced the regulations. Even given the benefit of all favorable inferences and presumptions, the plaintiffs have not shown that they have any basis for this allegation.

Prior to the effective date of the tobacco vending machine regulations, various tobacco companies, advertisers, and retailers brought suit against the FDA in the United States District Court for the Middle District of North Carolina, challenging the agency's authority to regulate tobacco under the FDCA. On April 25, 1997, the district court held that the FDA had the authority to issue some of the tobacco regulations but nevertheless ordered that the agency "shall not implement any of the additional Regulations set for implementation on August 28, 1997, pending further orders by the court." *Coyne Beahm*, 966 F. Supp. at 1400-01. The tobacco vending machine regulations at issue in this case were among the regulations which implementation was stayed by this order. Nothing in the language of the district court's order suggests that the scope of the

order was geographically limited to the Middle District of North Carolina. This Court believes that the district court's order was binding on the FDA on a nationwide basis as a matter of law. When a challenge is brought to the validity of a regulation, as opposed to a challenge to the application of an otherwise valid regulation, the district court's determination will be binding upon the entire agency across the nation. *See generally Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 890 n.2, 913 (1990) (noting how a successful challenge to an agency regulation by an individual can affect the entire agency program); *Harmon v. Thornburgh*, 878 F.2d 484, 495 n. 21 (D.C. Cir. 191989), *cert. denied sub nom., Bell v. Thornburgh*, 493 U.S. 1056 (1990), (stating that "[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated * * *."). It would be senseless to require the relitigation of the validity of a regulation in all federal district courts in order to effectively stay the implementation of a regulation when the challenge brought is programmatic, and not one of individual application. Even without considering the additional material submitted by the defendant, as a matter of law, the vending machine regulations never took effect, and, therefore, Count I must be dismissed.

Nevertheless, presuming that the FDA was not legally bound by the order of the United States District Court for the Middle District of North Carolina on a nationwide basis, the defendant has produced ample evidence that the FDA abided by the order on a nationwide basis and that the tobacco vending machine regulations were never enforced. The defendant has supplied this Court with a copy of a June 6, 1997 letter from William B. Shultz, FDA's Deputy Commissioner for Policy, to the plaintiffs in *Coyne Beahm*, which states in pertinent part that the district court's order requires the Agency not to implement any of its access provisions intended to go

into effect on August 28, 1997, pending further order of the court. It is our expectation, therefore, that retail establishments are beginning to make preparations to comply with these provisions, but that final action by them will await the Fourth Circuit's ruling. Consequently, it would be appropriate to grant an additional 90 days after the Fourth Circuit lifts the order of injunction. Def.'s Partial Mot. to Dismiss App. at 7.

In addition, the defendant provided this Court with a copy of Deputy Commissioner Shultz's June 9, 1997 letter to counsel for the plaintiffs in *Cigarette Ventures, Inc. v. FDA*, No. 97-CV-1352FMH (N.D. Ga.), in which the commissioner reiterates that the FDA would not enforce the vending machine regulations until 90 days after the stay in *Coyne Beahm* was lifted. Def.'s Partial Mot. to Dismiss App. at 9-10. Based on this letter, the plaintiffs in the *Cigarette Ventures* case withdrew their motion for a temporary or preliminary injunction of the FDA's vending machine regulations. *Id.* at 11-13.

The defendant also produced a copy of a Talk Paper issued on August 27, 1997, an FDA Backgrounder dated May 1997, and a copy of an FDA draft guidance publication from July 1997 entitled "Children & Tobacco, Frequently Asked Questions." *See Tobacco Regulation Update*, FDA TALK PAPER (Aug. 27, 1997) (T97-40) (Def.'s Partial Mot. to Dismiss App. at 15, Kirchner Decl. Ex. 2); *Summary of District Court's Ruling on FDA's Jurisdiction Over, and Regulation of, Cigarettes and Smokeless Tobacco*, FDA BACKGROUNDER (May 2, 1997) (BG 97-9) (Kirchner Decl. Ex 3); CHILDREN & TOBACCO, FREQUENTLY ASKED QUESTIONS (Draft Guidance) (July 1997) (DHHS Pub. No. (FDA) 97-1285) (Kirchner Decl. Ex. 4). These documents were used by the FDA's Press Office and Public Affairs Specialists to respond consistently and accurately to

public questions on the agency's tobacco regulations. Kirchner Decl. ¶ 6. All three of these documents clearly acknowledge that the regulations scheduled to go into effect on August 28, 1997, including the tobacco vending machine regulations, were delayed pending court action. For example, the Talk Paper explicitly sets forth that "retailers are not required to remove vending machines or self-service displays at this time." FDA TALK PAPER, *supra*.

Finally, the FDA presented a declaration from the last Acting Director of the Office of Tobacco Programs, Anne Kirchner,[20] which clearly states that the "FDA's Office of Tobacco Programs never developed a program to implement or enforce the Vending Machine regulation, and never brought any enforcement action for a violation of the Vending Machine regulation." Kirchner Decl. ¶ 8. With regards to the *Coyne Beahm* order, Ms. Kirchner explicitly acknowledges that the "FDA respected the district court's order nationwide." *Id.* at ¶ 6.

In contrast, the plaintiffs can point to nary a shred of evidence suggesting that the FDA enforced the tobacco vending machine regulations. Counsel for the plaintiffs represents well over 500 vending machine plaintiffs in related suits before this Court. It is beyond belief that counsel cannot produce a single piece of evidence supporting the plaintiffs' allegations.[21] While the plaintiffs have supplied this

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[20] Ms. Kirchner was a policy analyst in the Office of Policy at the FDA from January 1996 through 1997. As a policy analyst, she was assigned to work on the issuance and implementation of the FDA's tobacco regulations. In 1998, she joined the FDA's newly formed Office of Tobacco Programs as Regulatory Counsel. In 1999, she became Director of Tobacco Policy Coordination, and in June 2000, she was made Acting Director of the Office of Tobacco Programs. The Office of Tobacco Programs closed on September 29, 2000. *See* Kirchner Decl. ¶ 1.

[21] Indeed, this Court has given the plaintiffs multiple opportunities to produce any evidence that supports the plaintiffs' allegation that the FDA enforced the tobacco vending machine regulations. At hearings on Plaintiffs' Discovery Motion held on

Court with several declarations, none of these declarations provide any evidence of FDA enforcement of the tobacco vending machine regulations. These declarations show state and local enforcement of state and local tobacco vending machine regulations. *See, e.g.*, Pls.' Opp'n Br. App. at A-59-60 (Savar Decl.), A90-98 (Marchetti Decl.), A99-102 (Notini Decl.). The declarations evidence that the FDA notified public facility owners of the pending regulations. *See, e.g., id.* at A-56 (Frankhauser Decl.). But the plaintiffs' declarations do not provide any evidence of FDA enforcement of the vending machine regulations. Indeed, one of the declarations even candidly admits that the "new rules did not go into effect on the intended date * * *." *Id.* at A-54 (Valentine Decl.).

The Court acknowledges that the plaintiffs have shown evidence that tends to support the proposition that the FDA enforced the age and identification tobacco regulations. The defendant does not deny that the FDA enforced the age and identification tobacco regulations. *See* Kirchner Decl. ¶ 7. The age and identification tobacco regulations, however, are not at issue in this suit. The age and identification requirements did not require the removal of plaintiffs' vending machines; they merely barred the sale of cigarettes or smokeless tobacco to anyone younger than 18 years of age and required retailers to verify a

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October 17, 2000, and October 31, 2000, this Court directly questioned the plaintiffs whether they had any evidence supporting their theory that FDA enforced the regulations. In response to the Court's inquiry, the plaintiffs pointed to alleged evidence that had no connection with enforcement of the vending machine regulations by the FDA and asserted that they had "anecdotal" evidence of enforcement through "subterfuge." The ethereal and speculative nature of the plaintiffs' assertions compelled this Court to deny Plaintiffs' Motion to Compel Discovery on November 15, 2000. However, in this Order, the Court once again allowed the plaintiffs "the opportunity to attach any and all evidence in its possession of FDA enforcement of the tobacco vending machine regulations" to its Brief in Opposition to the Defendant's Partial Motion to Dismiss. *See* Order of November 15, 2000.

prospective purchaser's age by means of photographic identification. While the vending machine regulations would have had an impact upon the plaintiffs' abilities to enter into vending machine contracts with various facilities, the ability to contract was unimpaired by the age and identification regulations.

Several other courts have previously determined that the FDA abided by the *Coyne Beahm* stay. In *Vermont Vending, Amusement & Music Operators Associates, Inc. v. Hoyt*, Civil No. 1:97-CV-342 (D. Vt. Oct. 29, 1997), a trade association for cigarette vendors sought a temporary restraining order and preliminary injunction against a Vermont law that prohibited the sale of tobacco from vending machines except in those commercial establishments where no one under the age of 18 could legally enter. The vendors argued that the Vermont law was preempted by the FDA's tobacco vending machine regulations. The FDA submitted to the Vermont district court Deputy Commissioner Shultz's letter to counsel in *Coyne Beahm* and the Talk Paper dated August 27, 1997. Based on these submissions, the court held that "[t]he FDA is not currently enforcing its vending machine regulation." *Id.* at 4. Accordingly, the court denied the vendors' requested relief "because no federal requirements are currently in force with respect to cigarette vending machines." *Id.* at 6. The court further rejected suggestions that the North Carolina district court's order had no effect in Vermont, stating that "[n]either the language of the court order nor the FDA's interpretation of the order suggest that the stay is geographically limited." *Id.* at 7.

Similarly, in *T.D. Rowe Corp. v. City & County of San Francisco*, No. 992-022 (Sup. Ct. Calif., Jan. 16, 1998), a federal preemption challenge was asserted against a San Francisco ordinance banning tobacco vending machines. The plaintiff in that case also sought a temporary restraining order or preliminary

injunction against the enforcement of the local ordinance because of federal preemption. The Superior Court of the State of California denied the requested relief on the ground that "the FDA regulations * * * have been stayed by federal court order * * *." *Id.* at 1-2.

In addition, in a similar tobacco vending machine taking case before this Court, the Court has dismissed a tobacco vending machine owner/operator's takings claim against the United States because "[t]he vending machine regulations that would have restricted retailers in the placement of the machines never took effect." *B&G Enters., Ltd. v. United States*, 48 Fed. Cl. 866, 869 (2001) (J. Hodges), *appeal docketed*, No. 01-5080 (Fed. Cir. Apr. 9, 2001) ("*B&G II*"). In *B&G II*, the Court ordered the plaintiff toprovide documentation supporting its claim that the FDA "enforced" the vending machine regulations. *Id.* at 868. The Court found that the plaintiff was wholly unable to substantiate its claims of enforcement. In addition, the Court observed that several FDA publications and documents, as well as the *Coyne Beahm* order, supported the defendant's claim that the FDA never enforced the tobacco vending machine regulations. *Id.* at 868-69. Thus, the Court dismissed the plaintiff's complaint. *Id.* at 869.

In conclusion, there is not a scintilla of evidence that the FDA ever enforced the tobacco vending machine regulations. Implementation of these regulations was stayed by the United States District Court for the Middle District of North Carolina, and the FDA abided by this stay on a nationwide basis. Whether this Court treats the defendant's motion as either a motion to dismiss or a motion for summary judgment, Count I of the plaintiffs' Amended Complaint must be dismissed because the relevant FDA regulations never went into effect, as a matter of law and fact.

III. Taking as a Matter of law.

Finally, the defendant asserts that, as a matter of law, the vending machine regulation did not effect a taking of the plaintiffs' property. Def.'s Partial Mot. toDismiss at 42-61. The defendant claims that the plaintiffs neither lost a compensable property interest that would have been taken by the regulations, nor would the plaintiffs be able to show that the FDA's regulations constituted a Fifth Amendment taking of any such property interest. While this Court believes that the plaintiffs' takings claim could well be defective as a matter of law, the Court declines to rule on this issue at this time, finding that the FDA's lack of authority and the agency's failure to implement the vending machine regulations provide two separate and adequate independent grounds for dismissing Court I of the plaintiffs' Amended Complaint in any event. Nevertheless, for the sake of completeness, the Court will briefly discuss the defendant's arguments regarding the plaintiffs' claim being defective as a matter of law.

The Supreme Court has "eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment" and instead relies upon "ad hoc factual inquiries into the circumstances of each particular case." *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986). Nevertheless, this Court traditionally has used a two-tiered approach in evaluating regulatory takings claims. *See M&J Coal Co. v. United States*, 47 F.3d 1148, 1153-54 (Fed. Cir.), *cert. denied*, 516 U.S. 808 (1995); *Conti v. United States*, 48 Fed. Cl. 532, 536 (2001). First, this Court assesses whether or not the plaintiffs possess a sufficient ownership or other interest in the property allegedly taken such as to require compensation under the Fifth Amendment. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-30 (1992); *M&J Coal Co.*, 47 F.3d at 1154. Second, if such a

property interest is found, the Court will analyze "[t]he economic impact of the regulation on the claimant * * *, the extent to which the regulation has interfered with distinct investment-backed expectations * * * [, and] the character of the governmentl action" to determine if a compensable taking occurred. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Forest Props., Inc. v. United States*, 39 Fed. Cl. 56, 68 (1997), *aff'd*, 177 F.3d 1360 (Fed. Cir.), *cert. denied sub nom., RCK Props., Inc. v. United States*, 528 U.S. 951 (1999).

The defendant contends that the plaintiffs' interests in their vending machinesdoes not include the right to locate them wherever they want and that the FDA regulations do not infringe upon the plaintiffs' actual *ownership* interests in any way. Def.'s Partial Mot. to Dismiss at 45. Thus, the defendant concludes that there are no compensable property interests at stake in this litigation. In response, the plaintiffs assert that:

The Government's argument that Plaintiff does not have an economic expectancy relating to ownership of the machines misses the point. Plaintiff does not contend that the machines were taken * * *. It is the contracts that were destroyed, not the machines. The FDA regulations did not ban cigarette machines, but restricted their location to such an extent as to require termination of placement contracts. The Government is attempting to obfuscate this issue with a "straw man" argument. Pls.' Opp'n Br. at 13. *See also id.* at 11 ("The property alleged to have been taken in the Amended Complaint are the Placement Contracts between the cigarette vendors and the establishments where vending machines are located."). *But see* Am. Compl. ¶ 15 (asserting that "[t]he Final Rule's ban on vending machines and the Defendant's related actions have eliminated all economically viable uses of the Plaintiffs' cigarette vending machines and placement contracts.").

It is the plaintiffs, however, who miss the point, not the defendant. Admittedly, the Supreme Court has held that "[c]ontract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid." *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 19 n.16, *reh'g denied*, 431 U.S. 975 (1977). *See also Lynch v. United States*, 292 U.S. 571, 579 (1934). But in such cases, the contract is the property that was actually subject to the taking and the relevant contract that was "taken" was an agreement between the Government and the plaintiffs. For example, in *Lynch*, the Government completely repudiated all war risk insurance agreements that it had provided. The beneficiaries of the agreements brought suit and the Supreme Court held that these agreements were property, subject to compensation for a taking.[22] *See Lynch*, 292 U.S. at 579. Similarly, in *United States Trust Co. of New York v. New Jersey*, the Supreme Court's concern focused on the retroactive impairment of governmental bond obligations.[23] 431 U.S. at 19.

In contrast, the tobacco vending machines are the property whose value is at stake here, not the placement contracts. The placement contracts are contracts about compensable property, as opposed to being the compensable property themselves. Without the machines, there would be no placement contracts. The right to contract, of course, may be one of the rights associated with the vending machines. Property

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[22] Some modern courts have questioned whether *Lynch* is still good law, to the extent that it stands for the proposition that all contracts generally are property that the Government may not take without just compensation. *See Pro-Eco, Inc. v. Board of Comm'rs*, 57 F.3d 505, 510 n.2 (7th Cir. 1995) (holding that *Lynch* has been effectively overruled by subsequent cases)

[23] The holding in *United States Trust Co. of New York v. New Jersey* was based on the Contract Clause of the United States Constitution, U.S. Const. art I, § 10, cl. 1, not on the Fifth Amendment.

is, ultimately, "the group of rights which the so-called owner exercises in his dominion of the physical thing," such as "the right to possess, use and dispose of it." *United States v. General Motors Corp.*, 323 U.S. 373, 378, 380 (1945). But the plaintiffs cannot take one stick from the bundle of rights that they possess in their property and treat it as though it were the property alone in and of itself. "Interests that are not sufficiently bound up with the reasonable expectations of the claimant are not 'sticks' in the claimant's 'bundle of rights' and thus do not constitute property for Fifth Amendment purposes." *M&J Coal Co. v. United States*, 30 Fed. Cl. 360, 367 (1994) (citing *Penn Cent. Transp. Co.*, 438 U.S. at 124-25), *aff'd*, 47 F.3d 1148 (Fed. Cir.), *cert. denied*, 516 U.S. 808 (1995).

The FDA's regulations do not infringe on the plaintiffs' actual ownership of their tobacco vending machines in any way. The defendant has not seized the plaintiffs' machines. The regulations do not restrict the plaintiffs' right to transfer the machines, nor do they wholly bar the use of such machines for other vending purposes. Indeed, the regulations do not even bar the use of the machines to sell tobacco products. The plaintiffs may still enter into placement contracts. The regulations, however, if in effect, would have limited the use of tobacco vending machines in certain locations. While thisrestriction is directed at certain location owners rather than the plaintiffs, in an indirect way, the plaintiffs' abilities to contract with the location owners for the placement of their machines appears to have been impaired by the regulation.

The plaintiffs, however, do not have an unlimited right by contract to place their machines wherever they want. The Supreme Court has stated that "[c]ontracts, however express, cannot fetter the constitutional authority of Congress. Contracts may

create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them." *Connoly*, 475 U.S. at 223-24 (quoting *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240, 307-08 (1935)). The limitation on the ability to contract does not necessarily effect a taking of a property interest, especially when the contract itself is not the property interest at stake.

Even if the plaintiffs had a compensable property interest, however, it is doubtful that they could prove a taking. In determining whether a governmental action amounts to a taking or a mere diminution in property value (which by itself does not constitute a taking), the Court must assess the nature of the governmental action, the economic impact of the regulation on each plaintiff, and the extent to which the challenged regulation has interfered with each plaintiff's distinct investment-backed expectations. *Penn Cent. Transp. Co.*, 438 U.S. at 124; *Forest Props.*, 39 Fed. Cl. at 68. The latter two of these considerations are plainly plaintiff-specific, requiring individualized factual findings for each claimant. The factual intensity of a regulatory takings claim pertains not only to the quantum of damages that each plaintiff claims but also to the very question of whether or not a particular governmental action has effected a compensable Fifth Amendment taking as to each plaintiff. Nevertheless, prior to making a detailed fact finding on these matters, this Court can point out several difficulties with the plaintiffs' claims.

First, the courts have long recognized that regulatory action readjusting the benefits and burdens of public health and welfare generally does not effect a taking. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be

injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887). *See also Andrus v. Allard*, 444 U.S. 51 (1979); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Miller v. Schoene*, 276 U.S. 272 (1928); *James Everard's Breweries v. Day*, 265 U.S. 545 (1924); *Hadacheck v.Sebastian*, 239 U.S. 394 (1915).

There is no real argument that tobacco use is extremely injurious to the public health. Even the Supreme Court has acknowledged that the FDA had "amply demonstrated that tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *FDA v.Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). The plaintiffs do not deny the devastating impact of smoking on public health. The FDA tobacco regulations were aimed at addressing this threat. Such regulations would appear to fall within the ambit of *Mugler* and its progeny.

Second, it is difficult to imagine that the plaintiffs had a reasonable investmentbacked expectation that they would indefinitely be able to place their machines where children could access them. Every state in the nation has outlawed the sale of cigarettes to children. *See* 60 Fed. Reg. at 41,315. Additionally, the Federal Government has "incrementally expanded its regulatory scheme for tobacco products," and has enacted six separate pieces of legislation addressing tobacco use and health since 1965. *Brown & Williamson*, 529 U.S. at 137-38, 153. *See* Federal Cigarette Labeling and Advertising Act, Pub. L. No.

89-92, 79 Stat. 282 (1965); Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1969); Alcohol and Drug Abuse Amendments of 1983, Pub. L. No. 98-24, 97 Stat. 175 (1983) (codified at 42 U.S.C. §§ 290aa *et seq.*) Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200 (1984); Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99-252, 100 Stat. 30 (1986) (codified at 15 U.S.C. §§ 4401 *et seq.*); Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, Pub. L. No. 102-321, 106 Stat. 323 (1992) (codified at 42 U.S.C. §§ 300x *et seq.*). Accordingly, "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Connolly*, 475 U.S. at 227 (quoting *FHA v.The Darlington, Inc.*, 358 U.S. 84, 91 (1958), *reh'g denied*, 358 U.S. 937 (1959)); *Branch v. United States*, 69 F.3d 1571, 1579 (Fed. Cir. 1995), *cert. denied*, 519 U.S. 810 (1996).

Third, it may be fair to force some of the economic costs of the tobacco regulation upon those who have profited from the business. By the plaintiffs' own account, tobacco vending machines have been used in the United States for more than 50 years. Am. Compl. ¶ 4. The costs of preventing children and adolescents from using tobacco products is unavoidable. While this Court is not comfortable ruling on this issue as a matter of law at this time, it may be fair to place a portion of the burden of preventing tobacco use by children and adolescents upon those who have profited from such use. *See Branch*, 69 F.3d at 1579-80. Vending machines provide children and adolescents easy access to tobacco products, and vending machine owner/operators would have profited from such use.

Such discussions and concerns aside, however, this Court must dismiss theplaintiffs' Amended

Complaint because of the FDA's lack of authority to regulate tobacco in the first instance, and, in the alternative, because the relevant FDA tobacco vending machine regulations never went into effect.

CONCLUSION

For the foregoing reasons, the Defendant's Partial Motion to Dismiss Count I of the Amended Complaint is GRANTED. Because Count II of the Amended Complaint was previously dismissed in all the consolidated cases on March 15, 2001 and on April 13, 2001, these cases shall now be dismissed in their entirety. The Clerk of the Court is instructed to enter final judgment for the defendant and to dismiss the plaintiffs' Amended Complaints in all of the consolidated cases.

Each party is to bear its own costs.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

01-5070, -5080, -5083, -5084, -5120

BRUBAKER AMUSEMENT CO., INC., PAVLIC VENDING SERVICE, INC., AUTOMATED SERVICES, INC., B & G ENTERPRISES, LTD., A-1 CIGARETTE VENDING, INC., A&B CIGARETTE SERVICE, INC., A&H VENDING CO., INC., A. VAN BRACKEL & SONS, INC., ACE VENDING COMPANY, ADAMS & ADAMS, INC., ADVANCED VENDING CO., ADVANCED CIGARETTE SERVICE, AERO MERCHANDISING CORPORATION, AL FAINI VENDING, INC., ALL STAR AMUSEMENTS, ALLIANCE VENDING, INC., ANDERS VENDING SERVICE, ANDERSON GAMES CO., INC., APPLE VENDING CO., INC., ATLAS VENDING, AUTOMATIC MUSIC & VENDING CORPORATION, AUTOMATIC REFRESHMENT SERVICE, INC., AUTOMATIC VENDING SERVICE CORPORATION, AUTOMATIC MERCHANDISING CO., JAMES A. LEWIS D/B/A B&H VENDORS, BALLARD VENDORS, BECKER ENTERPRISES, BIG STATE VENDING CO., INC., BLUE CHIP VENDING CO., BOB'S MUSIC & CIGARETTE VENDING, INC., C&N SALES CO., INC., CHUCK'S CIGARETTE & VENDING, CIGARETTE VENDING SERVICE OF DALLAS, INC., CLASS A VENDING, COIN-OPERATED VENDING CO., COLONIAL VENDING COMPANY, COMPREHENSIVE VENDING SALES, CT'S VENDING, INC., DEAN SUPERIOR VENDING CO., D.C. VENDING COMPANY, INC., DICARLO VENDING CO., DOLLAR, VENDING COMPANY, EDWARD J. ZARICK, INC. (doing business as ALL-STAR VENDING), ELLIS AMUSEMENT, INC., EMPIRE SMOKES, INC., FRED TOTERA VENDING, INC., GENERAL VENDING SERVICES, INC., HAPPY HOUSE AMUSEMENTS, HAZELWOOD CORPORATION, HILLMAN VENDING CO., INC., HUGHES MUSIC COMPANY I.T. VENDING & NOVELTY CORPORATION, ISLE VENDING, INC., J&V

COIN MACHINE CO., J.S. VENDING, INC., JRE, INC. (doing business as FM VENDING), K&R SERVICES, INC., KAY-CEE VENDING, INC., KENTON NOVELTY CO., INC., LARRY'S AMUSEMENT & VENDING CO., LOWELL VENDING CO., INC., M.J. WHITE, INC., MANNIE'S VENDING, MARK V. HANKS CIGARETTE VENDING, MELO-TONE VENDING, INC., MELODY VENDING SERVICE, MENDOTA VALLEY AMUSEMENT, INC., MIAMI VALLEY AUTOMATED ASSOCIATED, INC., MILLER AMUSEMENT & VENDING CO., MODERN CIGARETTE SERVICE, N.W. SERVICES, INC., NEWMAN AMUSEMENT, INC., NEWPORT MUSIC CO., INC., NORTHERN AMUSEMENT, INC., OHIO VENDING MACHINE, INC., OWEN MUSIC AND GAMES, PARAMOUNT VENDING, INC., PENN TRIPLE S T/A PENN VENDING COMPANY, PIEDMONT BOTTLING & VENDING CO., PIONEER VENDING, INC., PRIDE VENDING, INC., PSI VENDING II, QUALITY ENTERTAINMENT COMPANY, RELIABLE VENDING SERVICE, INC., RENDEZVOUS MUSIC & VENDING, ROY GEORGE MUSIC & VENDING CORPORATION, ROYAL VENDING COMPANY, RUSSEL-HALL AMUSEMENTS & VENDING, SHAFFER SERVICES, INC., STANSFIELD VENDING, INC., STATE MUSIC DISTRIBUTORS, INC., SUBURBAN VENDING, SUPERIOR VENDING CORPORATION, T.D. ROWE CORPORATION, TOTAL SERVICE CORPORATION, VGI VENDING, INC., VIDEO DISTRIBUTORS, INC., W.L. PERRY MUSIC CO., INC., WAYNE VENDING CORPORATION, WESTERN AUTOMATIC MUSIC, INC., WILLIAMS ENTERPRISES, INC., KRUEGER VENDING SERVICES, BRIAN SUEMNICHT (doing business as HOME SERVICE VENDING COMPANY), and ANDERSON VENDING & COFFEE SERVICE,

Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

ORDER

Before MICHEL, Circuit Judge, BRYSON, Circuit Judge, and GAJARSA, Circuit Judge.

A petition for rehearing having been filed by the APPELLANTS, UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be and the same hereby is, DENIED.

The mandate of the court will issue on September 5, 2002, unless another time becomes appropriate under Rule 41.

FOR THE COURT,

/s/
Jan Horbaly
Clerk

Dated: August 14, 2002

cc: Douglas B. McFadden
Mark A. Melnick
John D. Echeverria

BRUBAKER AMUSEMENT V US, 01-5070, -5080, 5083, -5084, -5120

ISSUED AS A MANDATE: SEPTEMBER 5, 2002

Supreme Court, U.S.
FILED
FEB 12 2003
OFFICE OF THE CLERK

No. 02-734

In the Supreme Court of the United States

PENN TRIPLE S, T/A PENN VENDING COMPANY AND MELODY VENDING SERVICE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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14 pp

QUESTION PRESENTED

In 1996, the Food and Drug Administration (FDA) published regulations governing traditional cigarettes, which included restrictions upon the places where tobacco vending machines could be located. Before the date that the vending machine regulation was scheduled to go into effect, its implementation was enjoined by a district court. This Court subsequently held that the FDA lacked the authority to regulate traditional cigarettes, and the vending machine regulation was never enforced. Petitioners also filed separate suits contending that the vending machine regulation effected a temporary taking of their property. Those suits were dismissed by the Court of Federal Claims, and the court of appeals affirmed. The question presented is as follows:

Whether the court of appeals correctly held that no taking of petitioners' property occurred because implementation of the FDA's vending machine regulation was enjoined before its effective date and the regulation was never enforced.

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In the Supreme Court of the United States

No. 02-734

PENN TRIPLE S, T/A PENN VENDING COMPANY AND MELODY VENDING SERVICE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 304 F.3d 1349. The opinions of the United States Court of Federal Claims (CFC) are reported at 48 Fed. Cl. 866 and 49 Fed. Cl. 345 (Pet. App. 26-66).

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2002. A petition for rehearing was denied on August 14, 2002 (Pet. App. 67-69). The petition for a writ of certiorari was filed on November 8, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. On August 11, 1995, the Food and Drug Administration (FDA) issued proposed regulations "Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products To Protect Children and Adolescents." 60 Fed. Reg. 41,314, 41,453 (1995). *Inter alia*, the proposed regulations provided that tobacco products could be sold only to adults, and they required retailers to verify the age of persons wishing to buy tobacco products. The proposed regulations also "eliminate[d] 'impersonal' methods of sale that do not readily allow age verification, such as * * * vending machines." *Id.* at 41,315; see *id.* at 41,322-41,325. In support of its proposal to eliminate vending machines, FDA cited numerous studies indicating "that a significant percentage of adolescents are able to obtain their cigarettes from vending machines and that such purchases occur regardless of locks, warning signs, and other restrictions." *Id.* at 41,324-41,325.

On August 28, 1996, the FDA published its final regulations. 61 Fed. Reg. 44,396 (1996). The final regulations prohibited the sale of tobacco products to individuals under the age of 18 and required retailers to verify a purchaser's age by photographic identification. The final regulations did not entirely prohibit the sale of cigarettes from vending machines, however, but instead barred such sales "except in facilities where individuals under the age of 18 are not present or permitted at any time." *Id.* at 44,399; see generally *id.* at 44,426-44,462. The vending machine regulation was scheduled to become effective on August 28, 1997. Pet. App. 7.

In January 1997, the FDA sent a letter to retailers throughout the country, notifying them about the

tobacco regulations. 01-5120 C.A. App. A208-A212.[1] The letter and attachment explained that the age and identification requirements contained in the FDA regulations were scheduled to become effective on February 28, 1997, and that the vending machine regulation, as well as other provisions, was scheduled to become effective on August 28, 1997. See *id.* at A209. The letter did not suggest that the FDA would enforce the vending machine regulation before its August 28 effective date.

2. Various tobacco companies, advertisers, and retailers filed suit in the United States District Court for the Middle District of North Carolina, challenging the FDA's authority to regulate the tobacco industry. On April 25, 1997, the district court ruled that the FDA possessed the authority to issue all of the access restrictions. The court enjoined implementation of those regulations that had not yet become effective, however, including the vending machine regulation, pending interlocutory appeal of its ruling. *Coyne Beahm, Inc.* v. *FDA*, 966 F. Supp. 1374, 1397-1401 (M.D.N.C. 1997). The district court did not enjoin enforcement of the age and identification regulations, which had already taken effect. See *id.* at 1400. Accordingly, the FDA enforced those regulations through contracts entered into with state authorities. 01-5120 C.A. App. A220, A229.

On August 14, 1998, the United States Court of Appeals for the Fourth Circuit reversed the district court's judgment in *Coyne Beahm*, holding that the FDA was not authorized to regulate the tobacco industry. *Brown & Williamson Tobacco Corp.* v. *FDA*, 153

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[1] "01-5120 C.A. App." refers to the joint appendix filed in the court of appeals in *A-1 Cigarette Vending, Inc.* v. *United States*, No. 01-5120 (Fed. Cir.).

F.3d 155, 176 (1998). On March 21, 2000, this Court affirmed the judgment of the Fourth Circuit, concluding that "Congress has not given the FDA the authority that it seeks to exercise here." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

3. Petitioners are owners and operators of tobacco vending machine businesses. Pet. App. 6. They filed suit in the CFC, contending, *inter alia*, that the FDA's publication of the vending machine regulation had effected a temporary taking of their property. *Id.* at 8. Their suits were dismissed on the grounds that (a) the FDA's lack of statutory authority to issue the vending machine regulation precluded a takings claim against the United States, and (b) the regulation did not effect a taking of property because it was never enforced. See *id.* at 9-10.

4. The suits were consolidated on appeal, and the court of appeals affirmed. Pet. App. 1-25.

a. The court of appeals held that petitioners could not prevail on their takings claims because the vending machine regulation was never implemented or enforced. Pet. App. 17-20. The court stated that, notwithstanding the injunction entered by the district court in *Coyne Beahm*, petitioners remained free to offer evidence "that after the date the regulations technically went into effect, August 28, 1997, the FDA actually took steps to enforce them, in violation of the court order." *Id.* at 18. The court concluded, however, that petitioners "ha[d] not shown that any issue of disputed fact remains concerning whether the FDA enforced the regulations." *Id.* at 20. The court acknowledged that petitioners had offered "several declarations of operators of cigarette vending machines." *Id.* at 20 n.3. The court explained, however, that "[w]hile many of these declarations assert that state or local government

officials pressured them to remove vending machines from certain locations, none of the declarations state that the *FDA* enforced the regulations at any point, much less after they were to become effective." *Ibid.* The court declined to address the other grounds advanced by the government in support of the CFC's dismissal of the suits. *Id.* at 10-11.

b. The court of appeals also rejected petitioners' contention that they were entitled to discovery to determine whether the vending machine regulation was ever enforced. Pet. App. 21-22. The court observed that petitioners had "failed to demonstrate more than a 'speculative hope' of finding evidence to support their claim of enforcement." *Id.* at 22; see *id.* at 21 (noting the CFC's finding that petitioners had "produced absolutely no evidence to date to contradict the claim that the FDA did not enforce the tobacco vending machine regulations anywhere within the United States") (citation omitted). The court also explained that under Rule 56(g) of the Rules of the Court of Federal Claims (RCFC), "the party opposing the motion for summary judgment must file a sworn affidavit with the court stating the reasons that the party cannot respond to the motion without discovery. The [petitioners] in this case did not file such an affidavit." Pet. App. 21 (citation omitted).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioners seek review of the determination, endorsed by some but not all of the CFC judges who ruled in these cases, that petitioners' takings claims

against the United States failed because the FDA lacked statutory authority to issue the vending machine regulation. Pet. 6-10; see Pet. App. 9-10. That issue is not properly before this Court. The court of appeals affirmed the CFC's judgments on the ground that the vending machine regulation had never been enforced, and it specifically declined to address the government's alternative theories. See *id.* at 10-11. Because the court of appeals did not address the question whether the FDA's lack of statutory authority would preclude a takings claim, and because a ruling favorable to petitioners on that issue would not affect the court of appeals' judgment, the question is not properly presented here.

2. An as-applied claim that a non-discretionary regulation has taken property, entitling the claimant to recover just compensation, cannot be ripe before the regulation has actually become effective. See, *e.g.*, *Danforth* v. *United States*, 308 U.S. 271, 284, 286 (1939) (holding that mere enactment of legislation authorizing the taking of property at a later time is not a taking because the legislation could be repealed or modified, or appropriations could fail before it becomes effective). Because the FDA never implemented or enforced its vending machine regulation, the court of appeals correctly rejected petitioners' claims. Pet. App. 12-17.[2]

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[2] The possibility that potential contracting partners may have reacted to the FDA's announcement of the future implementation of the regulation by ceasing to do business with petitioners is irrelevant in the absence of an actual interference with petitioners' legal rights respecting their property. *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 15 (1984); *NBH Land Co.* v. *United States*, 576 F.2d 317, 318-319 (Ct. Cl. 1978). A taking can occur only when a final government regulatory act has actually restricted property rights. Cf. *United States* v. *Riverside Bayview*

Petitioners do not appear to dispute the court of appeals' holding that their takings claims cannot succeed absent proof that the FDA actually enforced its vending machine regulation. Rather, they contend that the CFC improperly denied them the opportunity to engage in discovery through which they might have acquired evidence of actual enforcement. The court of appeals correctly rejected that contention, holding that the CFC had not abused its discretion in denying discovery when petitioners (a) had produced no evidence that the vending machine regulation had ever been enforced, and (b) had failed to submit affidavits explaining why they could not respond to the government's motions for summary judgment without discovery. Pet. App. 21-22.[3]

Petitioners' argument on this score rests on a series of mischaracterizations of the court of appeals' opinion. First, there is no basis for petitioners' contention (Pet. 12) that the court of appeals ignored their declarations. To the contrary, the court of appeals specifically noted that petitioners had submitted "several declarations of operators of cigarette vending machines." Pet. App. 20 n.3. The court found that evidence to be unhelpful, however, because "none of the declarations state that the *FDA* enforced the regulations at any point." *Ibid.* The court also noted that petitioners had filed no affidavits explaining why discovery was needed to

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Homes, Inc., 474 U.S. 121, 126-127 (1985) (mere assertion of regulatory jurisdiction does not constitute a regulatory taking).

[3] As the court of appeals recognized (Pet. App. 22), the CFC's refusal to order discovery in this case is reviewed under an abuse-of-discretion standard. See *Keebler Co.* v. *Murray Bakery Prods.*, 866 F.2d 1386, 1388 n.1 (Fed. Cir. 1989); see also *Pierce* v. *Underwood*, 487 U.S. 552, 558-559 n.1 (1988) (noting that issues involving "supervision of litigation" are reviewed for abuse of discretion).

respond to the government's summary judgment motions. *Id.* at 21. That statement obviously was not an assertion that petitioners had filed no affidavits or declarations at all.

For much the same reasons, there is no merit to petitioners' assertion (Pet. 12) that "the court of appeals weighed the conflicting declarations and made findings of fact that there was no enforcement." The court of appeals did not make "findings of fact" or resolve any evidentiary dispute; rather, it concluded that petitioners had "not shown that any issue of disputed fact remains concerning whether the FDA enforced the regulations." Pet. App. 20. The court's assessment of the evidentiary record is correct, and in any event it raises no issue of broad importance warranting this Court's review. Nor is there any basis for petitioners' contention (Pet. 12) that, under the court of appeals' ruling, "a party seeking discovery to respond to a motion for summary judgment must prove his case before being entitled to discovery." The court of appeals in this case relied not only on petitioners' failure to present *any* evidence of actual FDA enforcement, but also on the fact that petitioners had "failed to avail themselves of the protection of RCFC 56(g) by not filing an affidavit explaining why they could not respond to the summary judgment motion without discovery." Pet. App. 22.[4]

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[4] There is no basis for petitioners' claim (Pet. 12) that the court of appeals' ruling in this case conflicts with the decisions in *Krieger* v. *Fadely*, 211 F.3d 134 (D.C. Cir. 2000), and *GAB Business Services, Inc.* v. *Syndicate 627*, 809 F.2d 755 (11th Cir. 1987). In *Krieger*, the plaintiff appealed from a district court's dismissal of his complaint under Federal Rule of Civil Procedure 12(b)(6). 211 F.3d at 135-136. *GAB Business Services* involved an appeal from a

Finally, this case is not plausibly characterized as one in which liberalized discovery is necessary "because the information needed to respond [to the government's summary judgment motion] is largely in the hands of the Government." Pet. 13. By definition, actual enforcement of the vending machine regulation would have involved coercive action taken against persons outside the government (such as petitioners themselves), who would necessarily have been aware that FDA enforcement efforts were ongoing. Yet, as the court of appeals explained, petitioners failed to offer "even a simple declaration from a witness stating that she knew from personal knowledge that the FDA had enforced the regulation." Pet. App. 20.[5]

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jury verdict. 809 F.2d at 757. Neither case presented any question concerning the proper standard for awarding summary judgment.

[5] The cases on which petitioners rely (Pet. 13) do not conflict with the court of appeals' decision here. *Gay* v. *Wall*, 761 F.2d 175, 177 (4th Cir. 1985), merely states that the non-moving party to a motion for summary judgment must be given a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Nothing in the decision dispenses with the specific requirements for justifying a request for discovery under Federal Rule of Civil Procedure 56(f). *Resolution Trust Corp.* v. *North Bridge Associates, Inc.*, 22 F.3d 1198, 1203 (1st Cir. 1994), states that such a discovery request requires a proffer setting forth "a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist," to permit discovery under Fed. R. Civ. P. 56(f). Here, petitioners failed to demonstrate any "plausible basis" for "believing" that the FDA had ever enforced the vending machine regulation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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